[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 742

BERTHA MEYER SMITH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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[fols. 1–5] Citation in usual form, showing service on J. J. Crossley, filed Oct. 26, 1932, omitted in printing.

[fol. 6]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

L-10639

BERTHA MEYER SMITH, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

[fol. 7] COMPLAINT—Filed May 22, 1929

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I

That at all times hereinafter mentioned, plaintiff was and now is a resident and inhabitant of the State of Oregon, and this residence is bona fide and continuous.

II

That plaintiff was the mother of one Elias Melvin Zimmerman, who enlisted with the United States Navy on or about March 18, 1914, at Portland, Oregon, as an apprentice seaman, and thereafter served in said U. S. Navy until March 17, 1918, when he received an honorable discharge therefrom, holding the rating of boatswains mate, second class, and reenlisted at the Naval Recruiting Station, New York City, N. Y., on March 18, 1918, and served thereafter until September 15, 1919, when he was honorably discharged from said Naval Service, and reenlisted on September 16, 1919, and thereafter served in said Navy until the date of his death, on June 30, 1921.

[fol. 8] III

That on or about the 3rd day of December, 1917, said Elias Melvin Zimmerman, made application for and re-

ceived a policy of War Risk Insurance in the sum of Ten Thousand ($10,000.00) Dollars, naming plaintiff as his beneficiary, and upon said application for said policy of War Risk Insurance, authorized the necessary monthly deductions from his pay, or if insufficient, from any money on deposit with the United States, in payment of the premiums on said policy of War Risk Insurance as they became due, unless otherwise paid, said policy conditioned that the said defendant would pay to the said beneficiary named therein, the sum of $57.50 per month for the full period of twenty (20) years, or two hundred and forty (240) months, and thereafter said policy remained in full force and effect until the date of the death of said Elias Melvin Zimmerman, by reason of said authorized deductions, as directed by said Elias Melvin Zimmerman in his application for said policy of War Risk Insurance.

IV

That said Elias Melvin Zimmerman died while aboard the U. S. Naval Vessel, "Conestoga."

V

That heretofore this plaintiff applied for the benefits accruing to her as beneficiary under the said policy of War [fol. 9] Risk Insurance, but the defendant disagreed, and failed and refused to make payment of said benefits accruing to this plaintiff, and now fails and refuses to make said payments, and a disagreement now exists between said plaintiff and said defendant with respect to said payments due under said policy of War Risk Insurance.

Wherefore, plaintiff prays for judgment that she receive the benefits accruing under the War Risk Insurance Policy of said Elias Melvin Zimmerman, from the 30th day of June, 1921, to this date, as made and provided by law.

B. A. Greene, Joseph Meyer, Attorneys for Plaintiff.

Duly sworn to by Bertha Meyer Smith. Jurat omitted in printing.

[fol. 10] STATE OF OREGON,
County of Multnomah, ss:

Due service of the within Complaint is hereby accepted in Multnomah County, Oregon, this 22nd day of May, 1929,

by receiving a copy thereof, duly certified to as such by B. A. Green of attorney for plaintiff.

George Neuner, U. S. Attorney, Attorney for Defendant, by Chas. W. Erskine, Asst. U. S. Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Aug. 3, 1929

Comes now the United States of America, by George Neuner, United States Attorney for the District of Oregon, and Livy Stipp, Assistant United States Attorney, and for answer to plaintiff's complaint, admits, denies, and alleges as follows:

[fol. 11] I

Alleges that defendant herein has no knowledge or information sufficient to enable it to form a belief as to the truth or falsity of any of the allegations contained in Paragraph I of plaintiff's complaint and, therefore, denies the same and puts the plaintiff on proof thereof.

II

Admits each and every allegation of Paragraph II of plaintiff's complaint, except defendant alleges that it has no knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations "that plaintiff was the mother of one Elias Melvin Zimmerman" and that Elias Melvin Zimmerman died on June 30, 1921, and, therefore, denies the same and puts the plaintiff on proof thereof.

III

Denies each and every allegation contained in paragraph III of plaintiff's complaint, except it admits that on December 3, 1917, the insured applied for and was granted war risk insurance in the amount of Ten Thousand ($10,000,00) Dollars, payable in monthly installments of $57.50 each in the event of his death or permanent and total disability occurring while the contract was in force or effect and that

insured designated as beneficiary of said insurance one [fol. 12] Bertha Meyer Smith, described as mother.

IV

Alleges that defendant herein has no knowledge or information sufficient to enable it to form a belief as to the truth or falsity of any of the allegations contained in paragraph IV of plaintiff's complaint and, therefore, denies the same and puts the plaintiff on proof thereof.

V

Admits each and every allegation contained in paragraph V of plaintiff's complaint.

For its first further and separate answer and defense, defendant alleges as follows:

I

That Elias Melvin Zimmerman, hereinafter called the "insured," enlisted in the United States Navy on March 18, 1914, and was honorably discharged therefrom on March 17, 1918, and re-enlisted on March 18, 1918, and was discharged September 15, 1919, and re-enlisted on September 16, 1919, and served in said Navy until June 30, 1921.

II

That on December 3, 1917, the insured applied for and was granted war risk insurance in the sum of $10,000 and designated one Bertha Meyer Smith, described as mother, as the beneficiary.

[fol. 13] III

That insured in his application for insurance stated as follows:

"I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be paid otherwise."

IV

That pursuant to said authorization as set forth in paragraph III hereof, premiums on insured's war risk insur-

ance were deducted from his service pay during his first enlistment, until March, 1918, but not thereafter.

V

That thereafter upon insured's enlistment on March 18, 1918, and again on September 16, 1919, he did not authorize the disbursing officer of the Navy Department to deduct premiums for his war risk insurance from his service pay, nor did insured apply for a new contract of war risk insurance as provided by Section 40 of the War Risk Insurance Act.

VI

That from the date of insured's second enlistment, namely: March 18, 1918, until June 30, 1921, he knowingly received full pay from the Navy Department without deduction of any amount for premiums upon his war risk [fol. 14] insurance, all of which the insured well knew.

VII

That by reason of insured accepting his full pay with full knowledge that premiums upon his war risk insurance were not deducted therefrom as hereinbefore set forth, he thereby revoked his original authorization to deduct premiums from his service pay and cancelled his said policy of war risk insurance as of April 30, 1918, and the same was not in force and effect thereafter.

For a second further and separate answer and defense, defendant alleges as follows:

I

That Elias Melvin Zimmerman, hereinafter called the "insured," enlisted in the United States Navy on March 18, 1914, and was honorably discharged therefrom on March 17, 1918, and re-enlisted on March 18, 1918, and was discharged September 15, 1919, and re-enlisted on September 16, 1919, and served in said Navy until June 30, 1921.

II

That on December 3, 1917, the insured applied for and was granted war risk insurance in the sum of $10,000 and designated one Bertha Meyer Smith, described as mother, as the beneficiary.

[fol. 15] III

That insured in his application for insurance stated as follows:

"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be paid otherwise."

IV

That pursuant to said authorization as set forth in Paragraph III hereof, premiums on insured's war risk insurance were deducted from his service pay during his first enlistment until March, 1918, but not thereafter.

V

That thereafter upon insured's enlistment on March 18, 1918, and again on September 16, 1919, he did not authorize the disbursing officer of the Navy Department to deduct premiums for his war risk insurance from his service pay, nor did insured apply for a new contract of war risk insurance as provided by Section 400 of the War Risk Insurance Act.

VI

That by reason of insured being discharged from the Navy on March 17, 1918, his authorization to deduct premiums on his war risk insurance from his service pay ter-
[fol. 16] minated with said enlistment and it become necessary for insured upon his reenlistment to issue a new authorization for the deduction of premiums.

VII

Therefore his war risk insurance lapsed for nonpayment of premium due April 30, 1918, and was not in force and effect thereafter.

For a third, further and separate answer and defense, the defendant alleges as follows:

I

That Elias Melvin Zimmerman, hereinafter called the "insured," enlisted in the United States Navy on March

18, 1914, and was honorably discharged therefrom on March 17, 1918, and re-enlisted on March 18, 1918, and was discharged September 15, 1919, and re-enlisted on September 16, 1919, and served in said Navy until June 30, 1921.

II

That on December 3, 1917, the insured applied for and was granted war risk insurance in the sum of $10,000 and designated one Bertha Meyer Smith, described as mother, as the beneficiary.

III

That insured in his application for insurance stated as follows:

[fol. 17] "I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be paid otherwise."

IV

That pursuant to said authorization as set forth in paragraph III hereof, premiums on insured's war risk insurance were deducted from his service pay during his first enlistment until March, 1918, but not thereafter.

V

That before January 1, 1921, the Navy Department issued Navy Circular No. 14, which discontinued the method of deducting premiums for war risk insurance from service pay and in its place an allotment system was installed whereby it became necessary for any person in the naval service to make such allotment for the payment of premiums upon his war risk insurance.

VI

That insured did not execute an allotment or authorization of the payment of insurance premiums through the Navy Department as required by Circular No. 14.

VII

That by reason of insured not complying with Circular [fol. 18] No. 14, his war risk insurance lapsed on January

1, 1921, for non-payment of the premium due on that date, if his said insurance was in force to January 1, 1921.

Wherefore, defendant having fully answered plaintiff's complaint, demands that plaintiff take nothing thereby and that the defendant go hence without day and recover of and from the plaintiff its costs and disbursements herein.

George Neuner, United States Attorney for the District of Oregon; Livy Stipp, Assistant United States Attorney.

Duly sworn to by Livy Stipp. Jurat omitted in printing.

[fol. 19] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REPLY—Filed April 20, 1931

Comes now the plaintiff herein and for reply to the defendant's answer admits, denies and alleges as follows, to-wit:

I

Plaintiff for reply to the allegations of Paragraph II of defendant's answer, states that the Navy Department itself has recognized the plaintiff herein as the mother of the insured, Elias Melvin Zimmerman, and on May 25, 1931, the Navy Department informed the plaintiff herein that noth-
[fol. 20] ing whatever had been heard from her son, the insured, Elias Melvin Zimmerman, since March 25, 1921, and on July 8, 1921, the Navy Department advised Bertha Meyer Smith, the plaintiff herein, and the mother of the insured, that her son, the insured, lost his life at sea while in the service of the United States, in the following words:

"Your son, Elias Melvin Zimmerman, First Boatswain's Mate USN will now appear on the records of the Navy Department as having lost his life on board the U.S.S. Conestoga as of June 30, 1921."

II

That the plaintiff herein for reply to the allegations of paragraph IV of defendant's answer alleges that some-

time shortly after the 1st of January, 1921, the insured was transferred to the U.S.S. Conestoga and no knowledge or information was ever heard from him or of him after March 25, 1921, and under date of July 8, 1921, the Navy Department Bureau of Navigation at Washington, D. C., notified this plaintiff that her son, the insured, lost his life on board the U.S.S. Conestoga as of June 30, 1921, in the following words:

"Your son, Elias Melvin Zimmerman, First Boatswain's Mate USN will now appear on the records of the Navy Department as having lost his life on board the U.S.S. [fol. 21] Conestoga as of June 30, 1921."

Plaintiff for reply to the defendant's first, further and separate answer and defense admits, denies and alleges as follows, to-wit:

I

That plaintiff admits the allegations of paragraph I of defendant's first, further and separate answer and defense.

II

Plaintiff admits the allegations of paragraph II of the defendant's first, further and separate answer and defense.

III

Plaintiff admits the allegations of paragraph III of the defendant's first, further and separate answer and defense.

IV

Plaintiff admits the allegations of paragraph IV of defendant's first, further and separate answer and defense, except the words "but not thereafter" appearing in line 11 of page 3 of defendant's answer and as to that allegation, plaintiff alleges that pursuant to the regulations issued by the Bureau of War Risk Insurance, insured made the order contained in his application and that by reason of such order and authorization of deductions from the insured's pay or deposit, it was the equivalent of tender [fol. 22] (T. D. No. 48 W. R. Par. 6, September 29, 1918) and that by reason of the provision contained in Bulletin No. 1

of the War Risk Insurance Bureau, such premium would be treated as paid whether or not such deduction was in fact made.

V

Plaintiff in reply to paragraph V of defendant's first, further and separate answer and defense, alleges that at the time the insured applied for his insurance on December 3, 1917, copy of which application for insurance is attached hereto marked Exhibit "A" and made a part hereof, he complied with the regulations of the War Risk Insurance Bureau Bulletin No. 1 issued pursuant to the provisions of Section 402 of the Act of October 6, 1917, 40 Statutes 409 and in force at the time the Certificate of insurance was issued to Elias Melvin Zimmerman contained the following regulations relative to the payment of premiums:

"Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient [fol. 23] to provide the premium, provided the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate but may be re-instated within six months upon compliance with the terms and conditions specified in the regulations of the Bureau"; and also,

"In case the applicant does not desire the premium to be deducted from his pay or his deposit, he should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deductions from his pay or if such pay be insufficient, any balance from his deposit";

That at the time of the expiration of his first enlistment, to-wit on March 17, 1918, a sufficient deduction had been made from his pay to carry his insurance to well within the

period of his new enlistment, to-wit, June 2, 1918; that the insured we receiving a monthly pay of not less than $44.00 and continued at that rate during all the period of said second term of enlistment and under his third term of enlistment, he was receiving a monthly pay of not less than $140.00; that said pay was at all times more than sufficient [fol. 24] to pay any and all premiums when due; that Elias Melvin Zimmerman, the insured, at the time of his application for insurance, gave an order contained in his application for insurance directing that all premiums as they become due should be deducted from his pay or from any deposit he had with the United States, which order was in words as follows:

"I authorize the necessary monthly deduction from my pay, or if insufficient from any deposit with the United States in payment of the premiums as they become due, unless they be paid otherwise."

That said order of the insured was never revoked either in writing or otherwise; that on March 17, 1918 and during all subsequent time of his service there was in force, the following regulations of the War Risk Insurance Bureau, to-wit:

"The insurance granted under Article IV of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premiums while the insured is in the active military or naval service, and premiums therefore are authorized to be deducted from the insured's pay or deposit." T. D. 33 W. R. September 20, 1918. Also:

"The insurance granted under Article IV of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premiums while the insured is in active mili- [fol. 25] tary or naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided." T. D. 44 W. R. May 17, 1919;

And that during all of said time up to the date of his death, the insured was in the active naval service of the United States.

VI

Plaintiff for reply to paragraph VI of defendant's first, further and separate answer and defense denies each and

every allegation thereof and plaintiff alleges that on the contrary, the insured absolutely believed that his insurance was in force and that payments of premiums were being deducted from his pay and while on leave of absence during December, 1920 and January, 1921, the insured in conversation with numerous friends, frequently asserted that he was keeping up his insurance and his insurance premium was being deducted from his pay.

VII

Plaintiff for reply to paragraph VII of defendant's first, further and separate answer and defense, denies that the insured revoked his order to deduct from his pay or that the acceptance of his pay in full, if he did so accept such pay, did revoke the order to deduct from his pay or from any deposit he had with the United States; the regulations governing the cancellation of War Risk Insurance provided [fol. 26] that such cancellation, when an order had been given to deduct premiums from his pay or deposit, must be in writing and is as follows:

"The insurance granted under Article IV of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premium while the insured is in the active military or naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided:

(b) When the insured shall have been for a period of sixty days or more in a status in which no pay applicable to the payment of premiums shall have accrued provided such premiums have not been paid when due or within 31 days thereafter;

(c) Upon written request, duly witnessed and forwarded through military channels to the Bureau of War Risk Insurance, for cancellation of the insurance in whole or in part and corresponding cessation or reduction of the deductions of the premiums from his pay or deposit in which case the insurance shall terminate or be reduced as the case may be, on the regular monthly renewal date of the policy in the month following that in which the request is made, and the regular monthly deductions will accordingly be made from the insured's pay or deposit at the end of the

calendar month in which the request for cancellation is [fol. 27] made." T. D. 44 W. R. May 17, 1919. T. D. 48 W. R. September 29, 1919.

And plaintiff alleges that no written order was ever given revoking the order to deduct from his pay or deposit and that no written order was ever executed by the insured cancelling his insurance or any part thereof and plaintiff further alleges that there was no interval of time in which the insured was out of the active naval service of the United States for a period of sixty days or in fact for any time whatever from the beginning of his service until his death.

Plaintiff for reply to the defendant's second, further and separate answer and defense admits, denies and alleges as follows, to-wit:

I

Plaintiff admits the allegations of paragraph I of defendant's second, further and separate answer and defense.

II

Plaintiff admits the allegations of paragraph II of defendant's second, further and separate answer and defense.

III

Plaintiff admits the allegations of paragraph III of defendant's second, further and separate answer and defense.

[fol. 28]

IV

Plaintiff admits the allegations of paragraph IV of defendant's second, further and separate answer and defense, except the words "but not thereafter" appearing in line 24 of page 4 of defendant's answer and as to that allegation, plaintiff alleges that pursuant to the regulations issued by the Bureau of War Risk Insurance, insured made the order contained in his application and that by reason of such order and authorization of deductions from the insured's pay or deposit, it was the equivalent of tender (T. D. No. 48 W. R. Par. 6, September 29, 1918) and that by reason of the provisions contained in Bulletin No. 1 of the War Risk Insurance Bureau, such premium would be treated as paid whether or not such deduction was in fact made.

V

Plaintiff in reply to paragraph V of defendant's second, further and separate answer and defense, alleges that at the time the insured applied for his insurance on December 3, 1917, copy of which application for insurance is attached hereto marked Exhibit "A" and made a part hereof, he complied with the regulations of the War Risk Insurance Bureau; Bulletin No. 1 issued pursuant to the provisions of Section 402 of the Act of October 6, 1917, 40 Statutes 409 and in force at the time the Certificate of insurance was [fol. 29] issued to Elias Melvin Zimmerman contained the following regulations relative to the payment of premiums:

"Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the Bureau"; and also,

"In case the applicant does not desire the premium to be deducted from his pay or his deposit, he should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deductions from his pay or if such pay be insufficient, any balance from his deposit";

[fol. 30] That at the time of the expiration of his first enlistment, towit on March 17, 1918, a sufficient deduction had been made from his pay to carry his insurance to well within the period of his new enlistment, to wit, June 2, 1918; that the insured was receiving a monthly pay of not less than $44.00 and continued at that rate during all the

period of said second term of enlistment, and under his third term of enlistment, he was receiving a monthly pay of not less than $140.00; that said pay was at all times more than sufficient to pay any and all premiums when due; that Elias Melvin Zimmerman, the insured, at the time of his application for insurance, gave an order contained in his application for insurance directing that all premiums as they become due should be deducted from his pay or from any deposit he had with the United States, which order was in words as follows:

"I authorize the necessary monthly deduction from my pay, or if insufficient from any deposit with the United States in payment of the premiums as they become due, unless they be paid otherwise."

That said order of the insured was never revoked either in writing or otherwise; that on March 17, 1918 and during all the time of his service there was in force, the following regulations of the War Risk Insurance Bureau, to-wit:

"The insurance granted under Article IV of the War [fol. 31] Risk Insurance Act will not be permitted to lapse for non-payment of premiums while the insured is in active military or naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided." T. D. 44 W. R. May 17, 1919;

And that during all of said time up to the date of his death, the insured was in the active naval service of the United States.

VI

That plaintiff for reply to paragraph VI of defendant's second, further and separate answer and defense, denies the same and the whole thereof and plaintiff alleges that the insured was the holder of a Continuous Service Certificate showing continuous service from the date of his first enlistment to the date of his death and his application for insurance hereinbefore set forth covered his whole period of service from the date of his first enlistment to the date of his death, and particularly in view of the provisions of Section 2861 United States Compiled Statutes 1918 that

"An extension of the period of enlistment as hereinbefore authorized aggregating four years shall be held and considered as equivalent to continued service with respect to all rights, privileges and benefits granted for such services pursuant to law."

[fol. 32]

VII

Plaintiff for reply to the allegations of Paragraph VII denies the same and the whole thereof.

Plaintiff for reply to the defendant's third, further and separate answer and defense, admits, denies and alleges as follows, to-wit:

I

That plaintiff admits the allegations of paragraph I of defendant's third, further and separate answer and defense.

II

Plaintiff admits the allegations of paragraph II of the defendant's third, further and separate answer and defense.

III

Plaintiff admits the allegations of paragraph III of defendant's third, further and separate answer and defense.

IV

Plaintiff admits the allegations of paragraph IV of defendant's third, further and separate answer and defense, except the words "but not thereafter" appearing in line 5 of page 6 of defendant's answer and as to that allegation, plaintiff alleges that pursuant to the regulations issued by the Bureau of War Risk Insurance, insured made the order contained in his application and that by reason of such [fol. 33] order and authorization of deductions from the insured's pay or deposit, it was the equivalent of tender (T. D. No. 48 W. R. Par. 6, September 29, 1918) and that by reason of the provision contained in Bulletin No. 1 of the War Risk Insurance Bureau, such premium would be treated as paid whether or not such deduction was in fact made.

V

That plaintiff for reply to the allegations of paragraph V of defendant's third, further and separate answer and

defense, denies the same, except as to the issuance of Navy Circular No. 14 by the Navy Department and as to this plaintiff has no knowledge or information sufficient to form a belief as to the truth or falsity thereof and therefore denies the same and puts the defendant on its proof and plaintiff further alleges that even though such a Circular was issued by the Navy Department, it was non-effective as to the contract of insurance between the Government and the insured, since the Secretary of the Treasury of the United States and the Director of the War Risk Insurance Bureau only had authority to make regulations as provided by Chapter 105, Section 13, 40 Statutes at Large, page 399, and the plaintiff denies that a regulations was made by the Secretary of the Treasury or the War Risk Insurance Bureau requiring that allotments be made to take the place and instead of the order [fol. 34] contained in his application to deduct premiums from pay or deposits; that Navy Circular No. 14 was not directed to the insured or ever brought to his attention and that no written request by the insured was ever made for the cancellation of his insurance, signed by him and attested as required by the directions contained in the provisions of Navy Circular No. 14.

VI

That plaintiff for reply to the allegations of paragraph VI of the defendant's third, further and separate answer and defense, denies the same and the whole thereof and alleges the facts to be that the insured had authorized the payment of insurance premiums by the terms of the order contained in his application for insurance, a copy of which is hereto attached marked Exhibit "A" and made a part hereof and that said order contained in his application for insurance authorized the payment and deduction of insurance premiums from his pay or deposits by way of allotment or otherwise.

VII

That the plaintiff for reply to the allegations of paragraph VII of defendant's third, further and separate answer and defense, denies the same and the whole thereof

and alleges that the insured was the holder of Continuous Service Certificate No. 49689 and was in his eighth year of continuous service; that by reason of the "authoriza-
[fol. 35] tion" of deductions from the insured's pay or execution of allotments from the insured's pay it was equivalent of tender. Section 6, T. D. 48 W. R. Sept. 29, 1919.

And by reason of such provisions and the order of insured, premiums were paid when due; and plaintiff further alleges that the insured was on leave of absence from the United States Navy during part of December, 1920 and during January, 1921 and reported for duty to the U. S. S. Charleston, on or about February 2, 1921 and was transferred to the U. S. S. Conestoga February 12, 1921 and served on that vessel until the date of his death, and that Navy Circular No. 14 issued just before or on or about January 1, 1921 by the Navy Department was never received by the insured and said Circular was never delivered to him or any knowledge of the contents thereof imparted to the insured; that from the beginning of insured's last enlistment on September 16, 1919 to the date of his death, he was of the rank of First Boatswain's Mate and was receiving pay of at least $140.00 per month and at all times had sufficient pay due him to meet the payments of insurance premiums of $6.50 per month on his insurance policy as authorized by the order contained in his application hereinbefore set forth; that the insured was in his third term of enlistment and had served thereunder one year and about four months before the issue of
[fol. 36] Navy Circular No. 14 by the Navy Department.

Wherefore, plaintiff prays for relief as in her original complaint.

J. J. Crossley, Joseph Meyer, Attorneys for Plaintiff.

Duly sworn to by Bertha Meyer Smith. Jurat omitted in printing.

EXHIBIT "A" TO REPLY

Treasury Department

C-72.5216 6,50 924898. Dec. 28, 1917

Bureau of War Risk Insurance

Division of Military and Naval Insurance

Form 2A

Navy Disbursing, Washington, D. C.

Application for Insurance

[fol. 37] My full name is (Given) Elias, (Middle) M., (Last name) Zimmerman.

Home address (No. and street or rural route) 490 E. Pine Street, (City, town, or post office) Portland, (State) Oregon.

Date of birth (Month) March, (Day) 12, (Year) 1895, (Nearest birthday) Age 23.

Date of last enlistment or entry into active service (Give month, day, and year) March 18, 1914.

I hereby apply for insurance in the sum of $10,000, payable as provided in the Act of Congress approved October 6, 1917, to myself during permanent total disability and from and after my death to the following persons in the following amounts:

Relationship to me	Name of Beneficiary (Given)	(Middle)	(Last Name)	Post office address (a) No. and street or rural route (b) City, town, or post office and state	Amount of insurance for each beneficiary (In multiple of $500 only)
Mother	Bertha	Meyer	Smith	(a) 490 E. Pine St.	
				(b) Portland, Ore.	$10,000
				(a)	
				(b)	

In case any beneficiary die or become disqualified after becoming entitled to an installment, but before receiving all installments, the remaining installments are to be paid to such person or person- within the permitted class of beneficiaries as may be designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy.

[fol. 38] I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

If this application is for less than $4,500 insurance and in favor of wife, child, or widowed mother, I offer it and it is to be deemed made as of February 12, 1918.

If this application is for less than $4,500 insurance and in favor of some person or person other than wife, child, or widowed mother, I offer it and it is to be deemed made as of (Date of signature)

[February 12, 1918]*

Strike out which ever is not wanted.

NOTE.—If in the last paragraph you strike out "Date of signature" leaving "February 12, 1918," the law gives you $25 a month for life in case of permanent total disablement occurring prior to such date and the same monthly amount to your widow, child, or widowed mother for not to exceed 240 months less payments made to you while living, but nothing to anyone else in case of your death before such date, and the insurance for the designated beneficiary other than wife, child, or widowed mother is effective only if you die on or after February 12, 1918.

If you strike out "February 12, 1918," leaving "Date [fol. 39] of signature," a smaller insurance both against death and disability takes effect at once, but is payable in case of death to the designated beneficiary.

To whom do you wish policy sent? (Name) Bertha Meyer Smith. (Address) 490 E. Pine Street, Portland, Oregon.

Signed at (on board) U. S. S. New Orleans, the 3 day of December, 1917.

Witnessed by: Wm. Haight, Rank: Ensign U. S. N., U. S. S. New Orleans.

Sign here: E. M. Zimmerman. (Organization:) U. S. Navy. (Rank or rating:) Cox.

---

*Words and figures enclosed in brackets stricken in copy.

(Over)

War Risk Insurance

Dec. 28, 1917.

Div. Military and Naval

Monthly Premiums for Each $1,000 of Insurance

(Each $1,000 of Insurance yields $5.75 per month for 240 Months)

Age	Monthly premium	Age	Monthly premium
15	$0.63	40	$0.81
16	.63	41	.82
17	.63	42	.84
18	.64	43	.87
[fol. 25]			
19	.64	44	.89
20	.64	45	.92
21	.65	46	.95
22	.65	47	.99
23	.65	48	1.03
24	.66	49	1.08
25	.66	50	1.14
26	.67	51	1.20
27	.67	52	1.27
28	.68	53	1.35
29	.69	54	1.44
30	.69	55	1.53
31	.70	56	1.64
32	.71	57	1.76
33	.72	58	1.90
34	.73	59	2.05
35	.74	60	2.21
36	.75	61	2.40
37	.76	62	2.60
38	.77	63	2.82
39	.79	64	3.07
		65	3.35

Insurance may be applied for in favor of one or more of the following persons with sum of $500 or a multiple thereof for each beneficiary, the aggregate not exceeding

the limit of $10,000 and not less than $1,000 upon any one life:

[fol. 41] Husband or wife.

Child, including legitimate child; child legally adopted before April 6, 1917, or more than six months before enlistment or entrance into or employment in active service, whichever date is the later; stepchild, if a member of the insured's household; illegitimate child, but, if the insured is his father, only if acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December 31, 1917, shall have been born in the United States or in its insular possessions.

Grandchild, meaning a child, as above defined, of a child as above defined.

Parent, including father, mother, grandfather, grandmother, stepfather and stepmother, either of the insured or of his/her spouse.

Brother or sister, including of the half blood as well as of the whole blood, stepbrothers and stepsisters and brothers and sisters through adoption.

1 December 1917.

Recorded this date by me. Checkage of premium ($6.50) will be made by me monthly from date of application.

First checkage made 1 December 1917 for $6.50.

[fol. 42] R. B. Bristol, Asst. Paymaster, U. S. N.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 9, 1932

This action having comes on regularly to be heard on March 2, 1932, the plaintiff being represented by J. J. Crossley, her attorney, and the defendant being represented by George Neuner, United States Attorney for the District of Oregon, by Rex Kimmel, Assistant United States Attorney, as its attorney; and having been stipulated in open

court that both parties waive a jury and agreed to present the matter to the court for determination upon a stipulation as to the facts, the sole question being whether at the time of the death of the insured the insurance was in force [fol. 43] and the respective counsel having presented their arguments to the court and having asked and secured permission to do so thereafter presented their briefs to the court on behalf of the respective contentions and the court being now fully advised in the premises makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That at all times mentioned in the pleadings the plaintiff, Bertha Meyers Smith, was and is now a citizen of the United States, a resident and inhabitant of the State of Oregon and such residence is bona fide and continuous.

2. That the plaintiff was and is the mother of one Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, who enlisted with the United States Navy on or about March 18, 1914 at Portland, Oregon, as an apprentice seaman and thereafter served in said United States Navy until and including March 17, 1918 when he received an honorable discharge therefrom holding the rating of Boatswain Mate, 2nd Class, and re-enlisted at the Navy Recruiting Station in New York City, New York, on March 18, 1918 and served thereafter until and including September 15, 1919 when he was honorably discharged from said naval service and re-enlisted on September 16, 1919 and thereafter served continuously in said Navy until the day of his death on [fol. 44] June 30, 1921 and said Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, was the holder of a continuous service certificate No. 49,689.

3. That on or about the 3d day of December, 1917, Elias Melvin Zimmerman, the same identical person as Elias M. Zimmerman and E. M. Zimmerman, made application for and was granted a policy of War Risk Insurance in the amount of Ten Thousand and $10,000.00 Dollars, payable in monthly installments of Fifty-seven and 50/100 ($57.50) Dollars each in the event of his death or permanent and total disability occurring while the contract was in force

or effect and that the insured designated as beneficiary of said insurance one Bertha Meyers Smith, described as mother.

4. That said Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, died while aboard the United States Naval Vessel Conestoga sometime between the 25th day of March and the 30th day of June, 1921 while in the naval service of the United States.

5. That heretofore the plaintiff applied for the benefits accruing to her as beneficiary under the said policy of War Risk Insurance, but the defendant disagreed, failed and refused to make payment of said benefits accruing to this [fol. 45] plaintiff and now fails and refuses to make said payments and disagreement now exists between said plaintiff and said defendant with regard to said payments due under said policy of War Risk Insurance.

6. That pay was due Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, for each and every day from and including March 18, 1914 to the official date of his death, June 30, 1921.

7. That the application for insurance with the Bureau of War Risk Insurance of the Treasury Department, together with the certificate of insurance which was issued to Elias Melvin Zimmerman, the same and identical person as Elias M. Zimmerman and E. M. Zimmerman under the authority of the acts of Congress was granted subject to the payment of premiums and was also subject to all regulations promulgated under said acts, then or thereafter in force, all of which together with the terms and conditions published under authority of the act constituted the contract.

8. The application for insurance contained the following provisions with reference to payment of premiums: "I authorize the necessary monthly deductions from my pay or if insufficient from any deposit with the United States in payment of the premiums as they become due unless they be otherwise paid."

[fol. 46] 9. During the period from December 3, 1917 to the date of his first re-enlistment monthly premiums of

$6.50 each were deducted the last deduction covering the installment of premiums due for the month of April, 1918, but subsequent to the re-enlistment of March 18, 1918 no deductions were made.

10. The sailor did not revoke the authority contained in his application for insurance or in any way indicate to the Government or to the Naval authorities his election to pay the premiums in any other manner than the deductions from pay or that he desired to let his insurance lapse. Following his first re-enlistment he received his pay monthly in full without any deductions for the monthly installments of premium.

11. At the time of his first re-enlistment on March 18, 1918 and at the time of his second re-enlistment on September 16, 1919, it does not appear that Zimmerman signed any papers whatever for the purpose of renewing previous authorization of deduction from pay for his yearly renewable term insurance and I find no statute or regulation requiring the insured to renew the authority which in his application he had conferred upon the Government to deduct the premiums from his pay, Zimmerman having a continuous service certificate.

12. Bulletin No. 1 issued pursuant to provisions of Section 402 of the Act of October 6, 1917, 40 Stat. 409, and in [fol. 47] force at the time the certificate of insurance was issued to Zimmerman contained the following regulations relative to the payment of premiums: "Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period of grace the insurance shall remain in full force"; also "In case the applicant does not desire the premium to be de-

ducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

13. Treasury Decision 44 War Risk Insurance dated May 17, 1919 and Treasury Decision 48 War Risk Insurance dated September 29, 1919 provided specifically that "The yearly renewable term insurance will not be permitted to lapse for non-payment of premiums while the insured is in the active military servic and premiums there- [fol. 48] fore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided" and there were no exceptions applicable to Zimmerman's case and Treasury Decision 48 of said War Risk Insurance dated September 29, 1919 further provided that "authorization of deductions from the insured's pay shall be equivalent of tender."

Conclusions of Law

Therefore, in conclusion I find that Zimmerman died June 30, 1921 while still in the service of the United States and that he had a continuous service certificate No. 49,689 and I rule that the policy of War Risk Insurance of Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, was in full force and effect at the time of the death of Zimmerman and that the petitioner and plaintiff in this case, Bertha Meyers Smith, is entitled to receive the installments due thereon up to this date as provided by law after deducting the premiums which the Government had previously failed to deduct, for which sum Judgment may be entered.

Dated this 9th day of August, 1932.

John H. McNary, Judge.

[fol. 49] [File endorsement omitted.]

In United States District Court

Verdict—Filed Aug. 9, 1932

The above entitled cause came on regularly to be heard on the 2nd day of March, 1932 before the Hon. John H.

McNary, Judge of the above entitled court, without the intervention of a Jury, the parties hereto having stipulated in open court to try said cause before the court without a Jury, plaintiff appearing in person and by her attorney, J. J. Crossley, and the defendant appearing by its attorney, Rex Kimmel, Assistant United States Attorney;

Whereupon, the court having read the stipulation of facts by the parties hereto and heard argument of counsel and having considered the briefs submitted by the respective counsel and now being fully advised in the premises, finds a verdict in favor of the plaintiff and against the defendant and that at the time of the death, on June 30, 1921, of Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, his policy of War Risk Insurance was in full force and effect [fol. 50] and the plaintiff herein named as beneficiary in said War Risk Insurance policy is entitled to recover the installments due from June 30, 1921 to this date.

Dated this 9th day of August, 1932.

John H. McNary, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed Aug. 9, 1932

The above entitled cause come on regularly to be heard on the 2nd day of March, 1932, before the Hon. John H. McNary, Judge of the above entitled court, without the intervention of a Jury, the parties hereto having stipulated and agreed in open court to try said cause before the court without a Jury and upon a stipulation of facts, the plaintiff appearing in person and by her attorney, J. J. Crossley, [fol. 51] and the defendant appearing by its attorney, Rex Kimmell, Assistant United States Attorney, and the court having considered the stipulation of facts and having heard the argument of the respective counsel and having made and entered a general verdict herein in favor of the plaintiff and against the defendant and having found in Findings of Fact and Conclusions of Law that the said War Risk Insurance policy of Elias Melvin Zimmerman,

who is the same identical person as Elias M. Zimmerman and E. M. Zimmerman, was in full force and effect on the date of his death, June 30, 1921, and that the plaintiff in this case who was named as beneficiary in said War Risk Insurance policy is entitled to the installments due on said $10,000.00 War Risk Insurance policy from June 30, 1921 to this date:

Now, therefore, the court being advised in the premises and according to said verdict, Findings of Fact and Conclusions of Law filed herein does enter his Judgment and

It is ordered and adjudged, That Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, died while in the service of the United States and while holding a continuous service certificate No. 49,689 on the 30th day of June, 1921 and that on the date of his death his War Risk Insurance policy for $10,000.00 was in full force and effect and judg-
[fol. 52] ment is entered herein in favor of the plaintiff, Bertha Meyers Smith, beneficiary and mother named in said War Risk Insurance policy, and against the defendant, United States of America and there is now due said Bertha Meyers Smith as such beneficiary upon such policy of War Risk Insurance which was carried by the said Elias Melvin Zimmerman and referred to in the complaint herein, the accrued payments of Fifty-seven and 50/100 ($57.50) Dollars per month for each month subsequent to the date of the death of said Elias Melvin Zimmerman, to-wit the 30th day of June, 1921, until this date, and

It is further ordered and adjudged, That there be and is hereby allowed to said plaintiff's attorney, J. J. Crossley, as a reasonable attorney's fee herein, ten (10%) per cent of the amount recovered by the plaintiff herein, that is to say 10% of each payment the plaintiff shall hereunder and hereafter collect from such insurance to be paid to J. J. Grossley by the Veterans Bureau of the United States out of the payments to be made under this judgment at the rate of one-tenth (1/10) of each of such payments;

And it is so ordered.

Dated this 9 day of August, 1932.

John H. McNary, Judge.

[fol. 53] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Feb. 21, 1933

Be it remembered that this cause came on regularly for trial on Wednesday, March 2, 1932, in the above-entitled Court before Honorable John H. McNary, District Judge, presiding, Plaintiff appearing by her counsel, J. J. Crossley, Esq., defendant appearing by Assistant United States Attorney Rex Kimmell. The jury having been waived, the case was tried before the Court and thereupon the following proceedings were had, to-wit: In connection with the statements of counsel for the respective parties, the following facts were stipulated and agreed upon:

STIPULATION OF FACTS

Plaintiff, Bertha Myers Smith, was the mother of one Elias Melvin Zimmerman, and beneficiary designated in the War Risk Insurance policy of said Elias Melvin Zimmerman.

That at all times mentioned in the pleadings, the plaintiff was and she now is a citizen of the United States and [fol. 54] a resident and inhabitant of the State of Oregon.

Elias Melvin Zimmerman enlisted in the United States Navy on March 18, 1914, at Portland, Oregon, as an apprentice seaman and that he served throughout such enlistment and was honorably discharged therefrom at the expiration thereof on March 17, 1918; that he re-enlisted in the United States Navy on March 18, 1918, and served throughout such enlistment and received an honorable discharge therefrom on September 15, 1919; that he re-enlisted on September 16, 1919, and served thereafter until the date of his death, June 30, 1921.

That Elias Melvin Zimmerman is holder of Continuous Service Certificate No. 49689.

That on the 3rd day of December, 1917, Elias Melvin Zimmerman made application for and was granted a policy of War Risk Insurance in the amount of $10,000, and that at the time of his application for such insurance, Elias Melvin Zimmerman authorized deductions to be made from his navy pay for the purpose of paying the monthly premiums on his insurance policy in the following words:

"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United

States in payment of the premiums as they become due, [fol. 55] unless they be otherwise paid."

That deductions were made from the pay of Elias Melvin Zimmerman until the expiration of his first enlistment, by which deductions premiums were paid on his insurance policy to and including the month of March, 1918. That thereafter no further deductions for the payment of insurance premiums were made; no further authority for deductions executed and no further premiums ever paid on such insurance.

That pay was due Elias Melvin Zimmerman for each and every day from and including March 18, 1914, to the official date of his death, June 30, 1921.

That at the time of his discharge on March 17, 1918, and on September 15, 1919, Elias Melvin Zimmerman was paid all the money then due him by the defendant.

That at the time of his death, June 30, 1921, pay was due Elias Melvin Zimmerman, which was later paid to the plaintiff.

War Risk Circular No. 14, S. & A. Circular letter 121-1920, dated October 20, 1920, was issued by the Navy Department, Bureau of Supplies and Accounts, Washington, D. C., on that date.

That in passing upon the question at issue the Court may consider as evidence the depositions and exhibits previously filed in the case.

[fol. 56] LIST OF EXHIBITS

The following exhibits were admitted in evidence by Stipulation:

Exhibit 1, Bulletin No. 1, War Risk Insurance Bureau.

Exhibit 2, Application for insurance of Elias Melvin Zimmerman, dated December 3, 1917.

Exhibit 3, Treasury Decision No. 33—War Risk Insurance, dated September 20, 1918.

Exhibit 4, Treasury Decision No. 44—War Risk Insurance, dated May 17, 1919.

Exhibit 5, Treasury Decision No. 48—War Risk Insurance, dated September 29, 1919.

Exhibit 6, Letter of Navy Department, dated May 25, 1921. (Included in Stipulation of facts.)

Exhibit 7, Letter of Navy Department, dated July 8, 1921. (Included in Stipulation of facts.)

It was further Stipulated that a disagreement exists between plaintiff and defendant.

Thereafter the following proceedings were had:

"Mr. Kimmell: The record shows there was deduction for the first enlistment for premiums.

Court: I think the service should be considered as continuous. The question is whether the Government should [fol. 57] have deducted the premiums. Of course, payments made to the month after his death would be after the policy had matured. I think you should tender the amount of the premiums, whatever they were.

Mr. Crossley: Of course, it is over ten years since he lost his life.

Court: Yes, but up to the time of his death, when the policy matured, to 1921.

Mr. Crossley: June 30, 1921. If you- Honor please, I think I would like to add an amendment to our complaint. I think there are five paragraphs and the sixth I would like to add, that plaintiff hereby makes tender of all premiums that may have been due, if any were due on the 18th day of March, 1918, to the 30th day of June, 1921.

The Court: Yes."

STIPULATION AS TO FACT IN CONTROVERSY

It was further stipulated and agreed that there was one fact only in controversy, namely: was the War Risk Insurance Policy applied for and obtained by Elias Melvin Zimmerman on December 3, 1917, in force and effect and unterminated on June 30, 1921.

The deposition of Lieutenant Walter Dismukes, taken and filed on behalf of the defendant in Washington, D. C., on December 2, 1929, in addition to the matters stipulated [fol. 58] and agreed upon, was in substance as follows:

I am at present in charge of the retainer division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and in such capacity have access to the records relating to enlisted men in the United States Navy;

that I have searched such records for the purpose of ascertaining what was disclosed by the records of the enlistments of Elias Melvin Zimmerman. The Navy Department records relating to Elias Melvin Zimmerman, disclose that he never made any allotment for War Risk Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance.

I further examined the records of the enlisted personnel aboard the United States Ship "Conestoga" with reference to Elias Melvin Zimmerman, and found that the record shows that twelve members of the crew of that ship executed allotments for the payment of premiums on War Risk Insurance, but that no allotment was executed by Zimmerman.

Thereafter the Court took the matter under advisement.

Within the time allowed by law, defendants requested the Court, prior to rendering judgment in said action, to make [fol. 59] the following Findings of Fact and Conclusions of Law and each of them, to-wit:

Defendant's Requested Findings and Conclusions

The Court, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

That at all times mentioned in the pleadings, plaintiff, Bertha Meyer Smith, was, and now is, a citizen of the United States and an inhabitant of the State of Oregon.

II

That plaintiff was the mother of one Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman.

III

That Elias M. Zimmerman enlisted in the United States Navy on March 18, 1914, and was honorably discharged therefrom on March 17, 1918; that he re-enlisted on March 18, 1918, and was regularly discharged at the termination of such enlistment on March 15, 1919; that he re-enlisted

on September 16, 1919, and served continuously thereafter until the date of his death, June 30, 1921.

IV

That on the 3d day of December, 1917, said Elias M. Zimmerman made application for and was granted a policy of [fol. 60] war risk insurance in the amount of $10,000, and that premiums were regularly paid thereon by authorized deduction from the service pay of said Elias M. Zimmerman each month to and including the month of March, 1918.

V

That plaintiff, Bertha Meyer Smith, was and is the beneficiary under said policy of insurance.

VI

That no premiums were paid on said policy of insurance, either directly by the insured or by deduction from insured's service pay, or otherwise, after the month of March, 1918.

VII

That a disagreement exists between the plaintiff and defendant.

VIII

That prior to June 30, 1921, said policy of insurance lapsed and terminated and ceased to exist.

Conclusions of Law

That plaintiff is not entitled to recover, for the reason that said Elias M. Zimmerman did not have a valid and unterminated policy of war risk insurance at the time of his death.

Dated at Portland, Oregon, this 8th day of August, 1932.

[fols. 61–67] That thereafter and prior to rendering judgment, the Court made the following Findings of Fact and Conclusions of law as requested by plaintiff, to-wit:

Findings of Fact and Conclusions of Law Omitted, printed side page 42, ante.

[fol. 68] DEFENDANT'S EXCEPTIONS TO COURT'S REFUSAL TO GRANT ITS REQUESTED FINDINGS AND CONCLUSIONS

Thereafter defendant excepted to the Court's refusal to grant its requested Findings of Fact and Conclusions of Law as follows, to-wit:

I

Defendant excepts to the Court's refusal to grant defendant's requested Finding of Fact No. 3, which was stipulated and agreed to by the parties.

II

Defendant excepts to the Court's refusal to grant defendant's requested Findings of Fact No. 6, which was stipulated and agreed to by the parties.

III

Defendant excepts to the Court's refusal to grant defendant's requested Finding of Fact No. 8, which was sustained by the facts stipulated and agreed to by the parties.

IV

Defendant excepts to the Court's refusal to make Defendant's requested Conclusion of Law No. 1, which is the proper deduction to be made by the Court as a matter of law from Defendant's requested Findings of Fact and the evidence stipulated and agreed to by the parties to said action.

DEFENDANT'S EXCEPTIONS TO FINDINGS AND CONCLUSIONS

Defendant excepted to the Findings of Fact and Conclu-
[fol. 69] sions of Law made by the Court as follows:

I

Defendant excepts to plaintiff's Finding of Fact No. 10, for the reason that the stipulated facts are that Elias Melvin Zimmerman neglected to pay any premiums on his policy of War Risk Insurance after March, 1918, and he neglected to make any authorization for the deduction of premiums from his pay or to execute an allotment for the

purpose of paying his insurance premiums after the termination of his first enlistment on March 17, 1918.

II

Defendant excepts to Finding of Fact No. 11, for the reason that there were statutes and regulations in effect requiring the insured to renew the authority to deduct premiums from his pay.

III

Defendant excepts to Findings of Fact No. 13, for the reason that no fact is stated therein and for the further reason that the Treasury decision referred to therein does not apply to the case of Elias Melvin Zimmerman.

IV

Defendant excepts to Finding of Fact and Conclusion of Law for the reason that Plaintiff is not entitled to prevail in this case and the same is not a proper conclusion of [fol. 70] law to be deducted from the evidence in this case.

The above exceptions were allowed by the Court.

Verdict and Judgment were rendered against the defendant herein on the 9th day of August, 1932, as follows:

Verdict omitted, printed side page 49, ante.

[fols. 71-72] Judgment omitted, printed side page 50, ante.

[fol. 73] Order Settling Bill of Exceptions

And now being willing that record should be made of said evidence and proceedings had in said cause, and within the time allowed by the rules of this Court and fixed by special orders made in this cause for settlement of defendant's Bill of Exceptions, I, John H. McNary, one of the Judges of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing Bill of Exceptions contains a full, true and correct statement in narrative form of all and the whole

[fol. 74] of the evidence taken and proceedings had upon the trial of the said action and said Bill of Exceptions likewise states the Exceptions taken and allowed by the Court on the trial of said action and I hereby settle and allow this Bill of Exceptions.

John H. McNary, District Judge.

Dated 2-21-1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER ALLOWING APPEAL—Filed Oct. 26, 1932

The above-named defendant, United States of America, conceiving itself aggrieved by the judgment filed and entered on the 9th day of August, 1932, in the above-entitled action, does hereby appeal from said judgment, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in the assignments of error filed herewith, and prays that this, its appeal, be allowed; that a citation issue as provided by law, and that a [fol. 75] transcript of the record and proceedings of said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

Dated at Portland, Oregon, this 26 day of October, 1932.

George Neuner, United States Attorney for the District of Oregon; Rex Kimmell, Assistant United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Oct. 26, 1932

Upon petition of the United States of America, defendant in the above-entitled cause,

It is ordered that the appeal of said defendant from the [fol. 76] judgment herein to the United States Circuit

Court of Appeals for the Ninth Circuit be, and the same is hereby, allowed.

Dated at Portland, Oregon, this 26 day of October, 1932.

John H. McNary, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Oct. 26, 1932

To the above-named Plaintiff, Bertha Meyer Smith, and J. J. Crossley, her attorney:

You, and each of you, will take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment and decree made and entered in the above-entitled cause and court and signed by the Honorable John H. McNary, one of the judges of said District Court, on the 9th day of August, 1932, which judgment and [fol. 77] decree was and is to the effect that Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, died while in the service of the United States and while holding a continuous service certificate, No. 49689, on the 30th day of June, 1921, and that on the date of his death his War Risk Insurance policy for $10,000 was in full force and effect, and that judgment is entered in favor of the plaintiff, Bertha Meyer Smith, beneficiary and mother named in said War Risk Insurance policy, and against the defendant, United States of America, and there is now due said Bertha Meyer Smith, as such beneficiary, upon such policy of War Risk Insurance which was carried by the said Elias Melvin Zimmerman and referred to in the complaint herein, the accrued payments of Fifty-seven and 50/100 ($57.50) Dollars per month for each month subsequent to the date of the death of said Elias Melvin Zimmerman, to-wit: the 30th day of June, 1921, and the defendant appeals from the whole of said judgment and decree.

Dated this 25 day of October, 1932.

George Neuner, United States Attorney for the District of Oregon; Rex Kimmell, Assistant United States Attorney.

[fol. 78] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Oct. 26, 1932.

The United States of America, being the defendant in the above-entitled cause, and appearing by George Neuner, United States Attorney for the District of Oregon, and Rex Kimmell, Assistant United States Attorney, and having filed a notice of appeal as required by law, that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment made and entered in said cause against said defendant herein, now makes and files in support of said appeal the following assignments of error, upon which it will rely for a reversal of said final order and judgment upon the said appeal, and which said error is to the great detriment, injury, and prejudice of this defendant, and said defendant says that in the records and proceedings upon the hearings and determination thereof in the District Court of the United States for the District of Oregon, [fol. 79] there is manifest error, in this, to-wit:

I

The court erred in refusing to make defendant's requested Finding of Fact No. 3,

"That Elias Melvin Zimmerman enlisted in the United States Navy on March 14, 1914, and was honorably discharged therefrom on March 17, 1918; that he re-enlisted on March 18, 1918, and was regularly discharged at the termination of such enlistment on September 15, 1919; that he re-enlisted on September 16, 1919, and served continuously thereafter until the date of his death, June 30, 1921."

II

That the court erred in refusing to make defendant's requested Finding of Fact No. 6,

"That no premiums were paid on said policy of insurance, either directly by the insured or by deduction from insured's service pay, or otherwise, after the month of March, 1918."

III

That the court erred in refusing to make defendant's requested Finding of Fact No. 8,

"That prior to June 30, 1921, said policy of insurance lapsed and terminated and ceased to exist."

[fol. 80]

IV

That the court erred in refusing to make defendant's requested Conclusion of Law No. 1,

"That plaintiff is not entitled to recover for the reason that Elias Melvin Zimmerman did not have a valid and unterminated policy of war risk insurance at the time of his death."

V

That the court erred in making Finding of Fact No. 10:

"The sailor did not revoke the authority contained in his application for insurance or in any way indicate to the government or to the navy authorities his election to pay the premium in any other manner than the deductions from pay or that he desired to let his insurance lapse."

VI

The court erred in making Finding of Fact No. 11:

"At the time of his first re-enlistment, March 18, 1918, and at the time of his second re-enlistment on September 16, 1919, it does not appear that Zimmerman signed any papers whatever for the purpose of renewing previous authorization of deduction from pay for his yearly renewable term insurance, and I find no statute or regulation requiring the insured to renew the authority which in his [fol. 81] application he had conferred upon the government to deduct the premiums from his pay, Zimmerman having a continuous service certificate."

VII

That the court erred in making Finding of Fact No. 13:

"Treasury Decision 44, War Risk Insurance, dated May 17, 1919, and Treasury Decision 48, War Risk Insurance,

dated September 29, 1919, provided specifically that 'Yearly renewable term insurance will not be permitted to lapse for nonpayment of premiums while the insured is in the active military service and premiums therefor are authorized to be deducted from the insured's pay or deposit, except as hereinafter provided', and there were no exceptions applicable to Zimmerman's case, and Treasury Decision 48 of said War Risk Insurance, dated September 29, 1918, further provided that "Authorization of deductions from the insured's pay shall be equivalent of tender.' "

VIII

That the court erred in making the following Conclusion of Law:

"Therefore, in conclusion, I find that Zimmerman died June 30, 1921, while still in the service of the United States, [fol. 82] and that he had a continuous service certificate, No. 49689, and I rule that the policy of war risk insurance of Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, was in full force and effect at the time of the death of Zimmerman, and that the petitioner and plaintiff in this case, Bertha Meyer Smith, is entitled to receive the installments due thereon up to this date, as provided by law, after deducting the premiums which the government had previously failed to deduct, for which sum judgment may be entered."

Wherefore, on account of the errors above assigned, defendant prays that the judgment of this Court be reversed, and that this case be remanded to said District Court and that such directions be given that the above errors may be corrected and law and justice be done in the matter.

Dated at Portland, Oregon, this 25 day of October, 1932.

George Neuner, United States Attorney for the District of Oregon; Rex Kimmell, Assistant United States Attorney.

[fol. 83] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Feb. 25, 1933

To the Clerk of the above-entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said Appellate Court and expressly including therein the following documents:

Citation on Appeal.
Complaint.
Answer.
Reply.
Findings of Fact and Conclusions of Law.
Verdict.
Judgment.
Bill of Exceptions.
Petition for Appeal.
[fol. 84] Order Allowing Appeal.
Notice of Appeal.
Assignments of Error.
Præcipe.

It is hereby stipulated by and between the respective parties to the above-entitled action, that the record and transcript to be prepared by the Clerk of the Court and Transmitted to the United States Circuit Court of Appeals for the Ninth Circuit shall consist of the above-named documents, omitting titles, verifications and acceptance of service on all said documents, except Citation on Appeal and Complaint.

J. J. Crossley, Attorney for Plaintiff. Rex Kimmell, Assistant United States Attorney.

[File endorsement omitted.]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed pages numbered from 5 to 84 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein in which Bertha Meyer Smith is plaintiff and appellee, and United States of America is defendant and appellant, in accordance with the praecipe for transcript filed by said appellant in said cause; that I have compared the foregoing transcript with the original record thereof, and that the foregoing transcript as corrected by me is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of comparing and certifying the within transcript is $10.10, and that the same has been charged against the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court in Portland in said District, this 13th day of March, 1933.

[Seal] G. H. MARSH,
Clerk.

No. 7109

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

BERTHA MEYER SMITH,

Appellee.

Upon Appeal from the District Court of the United States For the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the sixteenth day of May in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

No. 7109

UNITED STATES OF AMERICA,

Appellant,

vs.

BERTHA MEYER SMITH,

Appellee.

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. George Neuner, United States Attorney, counsel for the appellant, and by Mr. J. J. Crossley, counsel for the appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixth day of November in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

No. 7109

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Appeal from the District Court of the United States for the District of Oregon.

Before: WILBUR, SAWTELLE and MACK, Circuit Judges.

WILBUR, Circuit Judge:

The appellee brought this action against the government to recover on a policy of war-risk insurance issued to her son Elias Melvin Zimmerman in which she was named beneficiary.

The sole question involved in the case is whether or not the war risk insurance policy issued December 3, 1917 on the application of the insured was in effect on June 30, 1921 when he died. This question, in turn, depends upon whether or not the insurance premiums chargeable to the insured should be deemed to have been paid by him as required by the terms of the policy notwithstanding the fact that he did not in fact pay the premiums and no deductions were made from his pay therefor after the period of his enlistment which expired March 17, 1918. The facts were stipulated and may be briefly summarized as follows:

The insured enlisted in the United States Navy on March 18, 1914 at Portland, Oregon as an apprentice seaman. He served throughout such enlistment and was honorably discharged at the expiration thereof on March 17, 1918. During this enlistment, to wit, on December 3, 1917, he made applica-

tion for war risk insurance in the amount of $10,000 and at the time of his application for such insurance he expressly authorized deduction to be made from his Navy pay for the purpose of paying the monthly premiums on his insurance. In pursuance of this authorization such deductions were regularly made until the expiration of his first enlistment on March 17, 1918. He reenlisted on March 18, 1918, served throughout such enlistment, and received an honorable discharge therefrom September 15, 1919. He reenlisted the next day, September 16, 1919 and served thereafter until his death, June 30, 1921.

The insured was the holder of continuous service certificate No. 49689. Pay was due the insured for each and every day from and including March 18, 1914 to the date of his death, June 30, 1921. At the time of his discharge on September 15, 1919 the insured was paid all the money then due him by the defendant, without any deductions then or theretofore for or on account of premiums upon his policy. At the time of his death, June 30, 1921, the pay then due the insured was paid to the plaintiff, his mother, without such deductions.

From the foregoing stipulated facts it is clear that at the expiration of the second enlistment the insured was paid and accepted the entire balance due him from the government without any deduction of the premiums due and past due upon the policy of war risk insurance issued to him by the government, if such policy was in force. The continuation of this insurance by the provisions of the law and the terms of the policy was made dependent

upon the payment of the insurance premiums when due. The appellee claims, and the trial judge decided, that the insurance premiums should have been deducted from the pay of the insured when and as they accrued, by reasons of the direction to that effect given by the insured at the time he applied for his policy, as was done during the enlistment in which the policy was issued. On the other hand the government claims that the original direction was not effective after the discharge of the insured in March 1918, and that during the subsequent enlistment and at its termination by an honorable discharge both parties to the policy treated it as ended by the failure to pay premiums as therein agreed.

We have then to consider the effect of the transactions between the government and the insured during the enlistment beginning March 18, 1918 and at the time of his discharge therefrom. In view of the facts that the war risk insurance is purely a voluntary affair so far as the sailor is concerned, and that by the terms of the law and of the war risk insurance policy, and the regulations issued in pursuance of the law, the payment of premiums is essential to the continuance of the insurance, the voluntary acceptance by the insured of his full pay without deductions for premiums and without any provisions for otherwise paying the premiums, would clearly terminate the insurance by reason of the failure to pay the premiums when due in the absence of other controlling considerations. In this connection it should be noted that the method of

payment of premiums by "checking the pay account" of the sailor is a mere convenience for the benefit of the insured. By "checking the pay account" is meant the debiting of that account with the amount of the insurance premium. The appellee contends that, under the regulations issued by the Treasury, War and Navy Departments, it was the duty of the Navy paymasters in charge of insured's account to have checked his account for the amount of the war risk insurance premiums and that the failure so to do is a neglect chargeable to those officers and not to the insured, and consequently the insurance remained in effect notwithstanding this neglect.

It is conceded by the government that this position of the appellee is correct insofar as the first enlistment is concerned. Appellee's position in this case is based largely upon the theory that the insured held a continuous service certificate, and, consequently, the service of the insured was the same as though the original enlistment and the obligations of the government and of the insured under that enlistment continued throughout the entire period that the insured served as a sailor in the United States Navy, and that for the purposes of determining the rights of the government and of the sailor the discharge and reenlistment should be ignored. His service was in fact continuous, that is to say, there was no day during the entire period from his first enlistment until the date of his death when he was not in the Naval service of the government. There was, however, a hiatus in that service

due to the discharge and reenlistment. The continuous service certificate was evidence that the insured was entitled to certain rights and benefits accruing under the law by reason of continuous service. In other words, it is evident that for certain purposes the government regarded his reenlistment as a continuation of his service. The only other manner in which a sailor could serve the government continuously was by an extension of the enlistment for a period limited by statute. The policy of the government, as indicated by the legislation bearing upon the subject of enlistment, reenlistment and extension of enlistment, is to limit the period of service of the sailor to a fixed period at the expiration of which the contract of enlistment expires. In order to induce him to reenlist and to continue in the service of the government with the accruing benefit to the government of his service training certain inducements are held out to him, such as increased pay, increased rating and retirement pay. These inducements offered by the government, however, do not in any manner affect the fact that the original or subsequent enlistments are separate contracts. Each reenlistment is an absolutely new contract between the government and the sailor. The obligations assumed by the government in the event of reenlistment are different from those resulting from the earlier enlistments. These obligations are fixed by statute and by the regulations of the department and by reason thereof the sailor, who serves continuously by reenlistment or by an extension of an existing enlistment, receives an additional

consideration for the more valuable service thus rendered the government during the subsequent enlistment.

The discharge, however, under any enlistment absolutely terminates any contractual relation between the government and the sailor and the new relations assumed by each in connection with the reenlistment are entirely separate and distinct from the relations theretofore existing except as they are altered by statute or regulation applicable to the new status arising from the reenlistment. With these considerations in mind we continue the statement of facts as shown by the record.

It appears from the findings of the trial court that bulletin No. 1 issued in pursuance of §402 of the act of April 6, 1917, 40 Stats. 409, in force at the time the policy of insurance was issued to the insured, contained the following regulations relative to the payment of premiums:

> "Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period

> of grace the insurance shall remain in full force; * * * in case the applicant does not desire the premium to be deducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

It is conceded by the government that during the enlistment in which the war risk insurance policy was applied for, issued and authority to check the pay of the insured was given, the policy would remain in force and effect under the provisions of this rule regardless of whether or not such deduction was in fact made, but the deductions had in fact been made and the insurance was in effect at the time of the discharge of the insured.

During the enlistment beginning March 18, 1918, terminated by honorable discharge in September, 1919, certain rules and regulations were promulgated with relation to war risk insurance which have a bearing upon the situation.

On November 15, 1918 the Navy Department, Bureau of Supplies and Accounts, issued an order concerning war risk insurance and formal allotments. This order provided, among other things, in sub. 5:

> "Every application for insurance which is correct, shall be recorded at once by the officer carrying the account of the applicant. A description of the insurance shall be entered on

the pay roll and a record kept similar to that kept for Navy voluntary allotments (S & A Form 6). The following indorsement will be placed in the back of every recorded application for insurance:

....., 19.....
(Day) (Month)

Recorded by me this date. Checkage of premium ($.....) will be made to me monthly from date of application.

First checkage made....., 19.....
(Day) (Month)

for $.....

.....

.....Pay Corps, USN."

Sec. 8 provided:

"Checkage of insurance premium will continue while a man is in a pay status, or until the insurance is cancelled by written request over the man's signature, forwarded through the officer of the Pay Corps carrying his account."

Sub. 11 of this order, as amended January 13, 1919, provided:

"On discharge every man having an insurance application shall be furnished with a certified copy thereof and Treasury Bureau of War Risk Insurance Form 2303, 'Information Relative to Compensation and Continuance of War Risk Insurance,' properly filled out in duplicate. He shall be instructed to forward both

copies of Treasury Bureau of War Risk Insurance Form 2303 to the Bureau of War Risk Insurance with the first remittance of premium by him. He shall be further instructed that in case of reenlistment he shall give a certified copy of insurance application to the officer of the Pay Corps taking up his pay account. The officer of the Pay Corps shall check the monthly premium and notify the Disbursing Division, Supplies and Accounts, stating the date of first checkage by him."

It will be observed that under this order the application for insurance in the first instance and upon reenlistment the deposit of a certified copy of his insurance application with the officer of the pay corps taking up his pay account are deemed to be sufficient to justify the checkage of the pay account of the insured.

We may assume then that at the time of the discharge of the insured in September, 1919 he was advised that upon reenlistment he should give a certified copy of his insurance application to the officer of the pay corps taking up his pay account. This assumption is based upon the presumption of the performance of official duty. By Treasury Decision No. 44, Bureau of War Risk Insurance, issued May 17, 1919, it was provided in part as follows:

"1. The insurance granted under Article IV of the War Risk Insurance act will not be permitted to lapse for non-payment of premium while the insured is in the active military or

naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit, except as hereinafter provided. * * *"

On September 29, 1919 Treasury Decision No. 44 was revoked by Treasury Decision No. 48 whereby the word "therefor" was substituted for the word "therefore" in Treasury Decision No. 44. The difference between these two decisions is that under Treasury Decision No. 44 hereinabove quoted it might appear that the order authorized the deduction of the premium from the pay account of the insured regardless of whether or not it was authorized by the insured, whereas, under Decision No. 48, modifying the language of the earlier decision (44), it is argued by the government that the provision against permitting the lapse for non-payment of premium while the insured is in the active military naval service applies only in cases where the "premiums therefor are authorized to be deducted from the insured's pay or deposit * * *". It is claimed that this change was made to correct a typographical error in Treasury Decision No. 44. If both the insured and the government had treated the authorization for checkage made by the insured at the time of his application for war risk insurance as continuing throughout the subsequent enlistments, the checkage would have been made and the insurance premium thus paid. If, however, by some inadvertence the checkage was not made at the proper time to continue the insurance in force, the default of the officers in failing to make the check-

age if duly authorized thereto, would not have affected the rights of the insured. But where neither the government nor the insured treated the authorization in the previous enlistment as continuing in the subsequent enlistment and the insured not only failed to do that which was necessary on his part to be done to secure the checkage of his account, namely, to notify the officer of the existence of his war risk insurance by depositing with him a certified copy of his application for the insurance, and where by reason of his neglect no checking of his account was in fact made, and where, knowing as he must have known, that there was no such checkage of his account, he accepted the full amount of his pay at the time of his discharge without any deduction for premiums due and earned upon his policy, if it was in force, we are at a loss to know upon what theory we can hold that the insurance was in effect. It follows that at the expiration of the enlistment in September, 1919 the insured, by accepting the money which the appellee now claims should have been appropriated to the payment of the premium of the war risk insurance, in effect consented to an abandonment of his policy for his acceptance of the money which belonged to the government, if the insurance was in effect, cannot be considered otherwise than as a consent to the abandonment of the contract of insurance on his part and an agreement that the policy should be considered as lapsed.

We conclude then that the policy of insurance was not in effect on June 30, 1921, the date of

insured's death, and the appellee, the beneficiary named in the policy, is not entitled to recover thereon.

Judgment reversed.

[Endorsed]: Opinion. Filed Nov. 6, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7109

UNITED STATES OF AMERICA,

Appellant,

vs.

BERTHA MEYER SMITH,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

[Endorsed]: Filed and entered Nov. 6, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the eleventh day of December in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7109

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellee, filed December 5, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. J. J. Crossley, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 26,

1934; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California,
December 16, 1933.

[Endorsed]: Filed Dec. 15, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and four (104) pages, numbered from and including 1 to and including 104, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the state of California, this 11th day of January, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on cover:] File No. 38,345. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 742. Bertha Meyer Smith, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed January 25, 1934. File No. 742, O. T., 1933.

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CASES CITED

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OTHER CITATIONS

War Risk Insurance Bulletin No. 1 6
War Risk Ins. Cir. No. 1, Navy Dept. Nov. 15, 1918 14-16-19-23-24
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Supreme Court of the United States

October Term, 1933

No.....

BERTHA MEYER SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WITH SUPPORTING BRIEF

TO REVIEW A JUDGMENT IN CASE No. 7109 REVERSING A JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON GRANTING WAR RISK INSURANCE TO PETITIONER AS BENEFICIARY OF DECEASED SAILOR.

PETITION STATING SPECIAL AND IMPORTANT REASONS FOR WRIT OF CERTIORARI

Comes now your petitioner, Bertha Meyer Smith, appellee in the United States Circuit Court of Appeals for the Ninth Circuit and plaintiff in the United States District Court for Oregon, and petitions this Honorable Supreme Court of the United States to issue a Writ of Certiorari to the said United States Court of Appeals for the Ninth Circuit, to send up the complete record of the case entitled United States of America, appellant, vs. Bertha Meyer Smith, appellee, No. 7109 in order that the United States Supreme Court may review said case for the following special and important reasons:

I.

That the Circuit Court of Appeals for the Ninth Circuit has rendered a decision in this case in conflict with decisions of other Circuit Courts of Appeals, namely, the First and Tenth Circuits (July 31, 1933) on the same matter—that there was money due the insured and premiums should have been deducted.

U. S. vs. LaPage (C. C. A.-1) 59 Fed. (2nd Se.) 167-168.

Unger vs. U. S. (C. C. A.-10) 65 Fed. 2nd Se.) 946.

II.

It has decided an important question of Federal law, which has not been, but should be, settled by this

Court, to-wit: As to whether a contract of insurance on the sailor's application for insurance, unlimited as to time, ended with the enlistment in which it was made, the sailor having a continuous service certificate for more than seven (7) years.

O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.

Unger vs. U. S. (C. C. A.-10) 65 Fed. (2nd Se.) 946.

III.

It has decided an important question of general law in a way probably untenable or in conflict with the weight of authority—no case just like this one having been decided against the claimant, the Government being in a fiduciary relation to the insured sailor and the War Risk Acts and regulations should be interpreted liberally.

IV.

It has decided a Federal question in a way probably in conflict with applicable decisions of this Court—there being no written request of the sailor to cancel his insurance it was the duty of the paymaster to deduct the premium on his insurance in accordance with his written directions to do so.

V.

It has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise

of this Court's power of supervision—what right has a Department of the Government occupying a fiduciary relation to cancel a sailor's contract of insurance without his written request when that Department of the Government had in its possession at all times, sufficient money due the sailor from which to pay the premiums as he had given written directions to deduct?

STATEMENT OF THE CASE

A jury having been waived the case was tried before the District Court upon the following stipulated facts as shown on Pages 53 and 58 R. as follows:

Plaintiff, Bertha Meyer Smith, was the mother of one Elias Melvin Zimmerman, and beneficiary designated in the War Risk Insurance Policy of said Elias Melvin Zimmerman.

That at all times mentioned in the pleadings, the plaintiff was and she now is a citizen of the United States and a resident and inhabitant of the State of Oregon.

Elias Melvin Zimmerman enlisted in the United States Navy on March 18, 1914, at Portland, Oregon, as an apprentice seaman and that he served throughout such enlistment and was honorably discharged therefrom at the expiration thereof on March 17, 1918; that he re-enlisted in the United States Navy on March 18, 1918, and served throughout such enlistment and

received an honorable discharge therefrom on September 15, 1919; that he re-enlisted on September 16, 1919, and served thereafter until the date of his death, June 30, 1921.

That Elias Melvin Zimmerman is holder of Continuous Service Certificate No. 49689.

That on the 3rd day of December, 1917, Elias Melvin Zimmerman made application for and was granted a policy of War Risk Insurance in the amount of $10,000, and that at the time of his application for such insurance, Elias Melvin Zimmerman authorized deductions to be made from his navy pay for the purpose of paying the monthly premiums on his insurance policy in the following words:

> "I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid."

That deductions were made from the pay of Elias Melvin Zimmerman until the expiration of his first enlistment, by which deductions premiums were paid on his insurance policy to and including the month of March, 1918. That thereafter no further deductions for the payment of insurance premiums were made; no further authority for deductions executed and no further premiums ever paid on such insurance.

That pay was due Elias Melvin Zimmerman for each and every day from and including March 18, 1914, to the official date of his death, June 30, 1921.

That at the time of his discharge on March 17, 1918, and on September 15, 1919, Elias Melvin Zimmerman was paid all the money then due him by the defendant.

That at the time of his death, June 30, 1921, pay was due Elias Melvin Zimmerman, which was later paid to the plaintiff.

War Risk Circular No. 14, S. & A. Circular letter 121-1920, dated October 20, 1920, was issued by the Navy Department, Bureau of Supplies and Accounts, Washington, D. C., on that date.

That in passing upon the question at issue the Court may consider as evidence the depositions and exhibits previously filed in the case.

The following exhibits were admitted in evidence by Stipulation:

Exhibit 1, Bulletin No. 1, War Risk Insurance Bureau.

Exhibit 2, Application for insurance of Elias Melvin Zimmerman, dated December 3, 1917.

Exhibit 3, Treasury Decision No. 33—War Risk Insurance, dated September 20, 1918.

Exhibit 4, Treasury Decision No. 44—War Risk Insurance, dated May 17, 1919.

Exhibit 5, Treasury Decision No. 48—War Risk Insurance, dated September 29, 1919.

Exhibit 6, Letter of Navy Department, dated May 25, 1921.

(Included in Stipulation of facts.)

Exhibit 7, Letter of Navy Department, dated July 8, 1921.

(Included in Stipulation of facts.)

IT WAS FURTHER STIPULATED that a disagreement existed between plaintiff and defendant.

Thereafter the following proceedings were had:

MR. KIMMELL: The record shows there was deduction for the first enlistment for premiums.

COURT: I think the service should be considered as continuous. The question is whether the Government should have deducted the premiums. Of course, payments made to the month after his death would be after the policy had matured. I think you should tender the amount of the premiums, whatever they were.

MR. CROSSLEY: Of course, it is over ten years since he lost his life.

COURT: Yes, but up to the time of his death, when the policy matured, to 1921.

MR. CROSSLEY: June 30, 1921. If your Honor please, I think I would like to add an amendment to our complaint. I think there are five paragraphs and the sixth I would like to add, that plaintiff hereby makes tender of all premiums that may have been due, if any were due, on the 18th day of March, 1918, to the 30th day of June, 1921.

THE COURT: Yes.'

IT WAS FURTHER STIPULATED and AGREED that there was one fact only in controversy, namely; was the War Risk Insurance Policy applied for and obtained by Elias Melvin Zimmerman on December 3, 1917, in force and effect and unterminated on June 30, 1921.

The deposition of Lieutenant Walter Dismukes, taken and filed on behalf of the defendant in Washington, D. C., on December 2, 1929, in addition to the matters stipulated and agreed upon, was in substance as follows:

I am at present in charge of the retainer division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and in such capacity have access to the records relating to enlisted men in the United States Navy; that I have searched such records for the purpose of ascertaining what was disclosed by the records of the enlistments of Elias Melvin Zimmerman. The Navy Department records relating to Elias Mel-

vin Zimmerman, disclose that he never made any allotment for War Risk Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance.

I further examined the records of the enlisted personnel aboard the United States Ship "Conestoga" with reference to Elias Melvin Zimmerman, and found that the record shows that twelve members of the crew of that ship executed allotments for the payment of premiums on War Risk Insurance, but that no allotment was executed by Zimmerman.

THE QUESTION PRESENTED

The real question presented in this case is whether the War Risk Term insurance policy issued to Elias Melvin Zimmerman on his application dated December 3, 1917, and on which it appears no premiums were paid after the month of March, 1918, was kept in full force and effect during his continuous active service in the United States Navy from March 18, 1914, to June 30, 1921, during two subsequent re-enlistments without a single day out of active service by reason of an authorization unlimited as to time, for deduction of insurance premiums from active service pay executed during an enlistment extending from March 18, 1914 to March 17, 1918, and not renewed during such continuous subsequent enlistments which authorization was never revoked and there was always sufficient

pay due Elias Melvin Zimmerman to pay the premiums on his insurance, he having continuous service certificate No. 49,689 and he had not been discharged from active naval service of the United States at the time of his death.

ASSIGNMENTS OF ERROR INTENDED TO BE URGED

I. In holding that the contract of insurance on the sailor's application for insurance ended with the enlistment in which it was made or any subsequent re-enlistment when the sailor was the holder of a continuous service certificate No. 49, 689.

II. In holding without any evidence to support the same, that the insured sailor, Zimmerman, accepted his full pay knowing it to be such.

III. In holding that the Navy Circular No. 1 of November 15, 1918 and No. 3 of January 13, 1919, and No. 14 of October 20, 1920 and Treasury Decision No. 48 of September 29, 1919 are applicable to and controlling in this case.

IV. In holding that the Court may assume that this sailor was advised that he should give his certified copy of his insurance application to the officer of the pay corps having his account when the sailor's service was active and continuous.

V. In holding that the insured sailor did not treat

his written authorization to deduct premiums in his application for insurance as continuing in subsequent enlistments, there being no written request for cancellation of his policy and the insured being the possessor of a continuous service certificate.

VI. In holding that the insured sailor's War Risk Term insurance was cancelled without his written request, there being money due him at all times from the Government occupying a fiduciary relation to the sailor, from which to deduct the premiums as he had directed in his written application.

VII. In holding to a severely strict construction of the War Risk Insurance law and regulations when they should be construed liberally.

SUMMARY OF ARGUMENT

Your petitioner respectfully urges upon this Honorable Court that a Writ of Certiorari to the United States Circuit Court of Appeals should be issued in this case in order that this Court may review the said Circuit Court of Appeal's decision because of the special and important reasons hereinbefore and hereafter set forth:

(1.) There was always something due Zimmerman from the Government for his active service pay from which to deduct the payments for premium on his insurance authorized in his application without limit as to enlistment.

(2.) That Zimmerman had a continuous service Certificate No. 49689, having served over seven (7) years continuously in the Navy and that not only at the last of each month did he have pay due him enough to pay the premium on his insurance, but that at the time of his death he had more than enough due him to pay all of his premiums which the Government had failed to deduct.

(3.) That the authorization for deduction of premiums from active service did not expire with the enlistment in which it was executed.

(4.) That it was not necessary to have such authorization renewed and the Navy Pay Master had full authority and should have deducted the insurance premiums during the subsequent enlistments.

(5.) That Zimmerman did not understand that there was any law or regulation which would prevent the Government from deducting the premium as he had authorized and that Zimmerman did desire insurance protection subsequent to his first enlistment.

(6.) That Zimmerman did not by any writing or otherwise revoke or cancel his policy of insurance or the authorization which he had given for deduction of premiums on his insurance from his active service pay and that the insurance policy in this case was in full force and effect on the date of the death of Elias Mel-

vin Zimmerman while he was yet in the active service of the Navy on June 30, 1931.

ARGUMENT

ASSIGNMENT OF ERROR No. I

This plaintiff and petitioner contends that the contract of insurance on the sailor's application did not expire with the enlistment in which it was made or his subsequent enlistment for the reasons that:

(1.) The enlistment contract applied to service only, while the contract of insurance, based upon the application therefor, was separate and distinct and made at a different time.

See Page 36 R.

O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.

Unger vs. U. S. (C. C. A.-10) 65 Fed. 2nd Se.) 946.

(2.) There was no limit as to the time the contract of insurance should run stated in the application of the insured, which application was accepted by the Government, and there was no time limit upon the authorization to deduct premiums for the insurance.

Page 36 to 42 R.

(3.) The insured sailor had a continuous service certificate No. 49, 689 and he had at the time of his death been serving for more than seven (7) years in

the navy of the United States from March 18, 1914 to the date of his death June 30, 1931.

(4.) The Government itself did not require a new application for a new contract of insurance upon re-enlistment as is evidenced by the fact that when a sailor was discharged and left the service he could still keep up his insurance.

See 11 War Risk Ins. Circular No. 1 Navy Dept.
Bureau of Supplies and Accounts Dated Nov. 15, 1918.

War Risk Ins. Circular No. 3.
Navy Dept. Bureau of Supplies and Accts.
Dated Jan. 13, 1919.

(5.) Also if a sailor re-enlisted after being out of the service for some time, all he needed to do was to present a certified copy of his insurance application and thus his insurance continued.

Under "Re-enlistment" War Risk Ins. Circular No. 14 Navy Dept. Bureau of Supplies and Accounts Dated Oct. 20, 1920.

ASSIGNMENT OF ERROR No. II

This plaintiff and petitioner contends that the insured sailor did not accept his full pay knowing it to be such for the following reasons:

(1.) That there was no evidence in this case whatever to show that Zimmerman, the insured, knew that he was paid in full either monthly or at the end of his enlistments.

(2.) That Zimmerman's pay varied from time to time since he was making an allotment to his mother, which varied from time to time.

(3.) That any purchases by the insured from the Ship Stores on board ship would be deducted from his pay, and that, too, would make the amount of the pay he himself received vary from time to time.

ASSIGNMENT OF ERROR No. III

This petitioner and plaintiff contends that Circular No. 1 of the Navy Department Bureau of Supplies and Accounts dated November 15, 1918 as amended by Circular No. 3 of January 13, 1919 and Circular No. 14 of October 20, 1920 and Treasury Decision No. 48 were not sufficiently applicable to and controlling in the case at bar to cancel and terminate the insurance of this sailor for the reasons that:

(1.) Circular No. 1 of November 15, 1918 was not in effect and therefore could not apply to the reenlistment of the insured on March 18, 1918.

(2.) Considering this Circular No. 1 of November 15, 1918 to have been in effect on September 15, 1919 when the sailor re-enlisted a second time it stated

that a checkage of insurance premium will continue while the man is in a pay status.

Par. 8 Navy Dept. Circular No. 1 Bureau of Supplies and Accounts of Nov. 15, 1918.

(3.) There was never a written request over Zimmerman's signature to cancel his insurance, and no proof whatever of such request.

(4.) That the discharge spoken of in Circular No. 3 of January 13, 1919 referred particularly to men who left the service as it provided for the first remittance of premium by the insured himself and not through the Paymaster, unless he re-enlisted at a later date, and in the Second Circuit the Court of Appeals sets forth a part of Form 2303 which stated:

"After discharge from the service when your Government pay ceases, you should send check or money order drawn to the Treasurer of the United States at Washington, D. C."

Sawyer vs. U. S. (C. C. A.-2) 10 Fed. (2nd Se.) 416.

(5.) The officer of the pay corps already had the insured's pay account, and if the sailor continued in service as he did, the checkage would be continuous instead of a first checkage by the Paymaster.

(6.) That Treasury, Bureau of War Risk Insurance, Form 2303, containing information relative to

compensation and continuation of War Risk Insurance was intended to be filled out in duplicate in the event a sailor was finally discharged and went out of the service for sometime, and this applied too, to the certified copy of his insurance application, as it will be noted he was to be instructed to forward these papers direct to the Bureau of War Risk Insurance with his first remittance of premium, when the insured was out of active service and out of a pay status, but this did not apply to Zimmerman as he was always on a pay status and was never out of active service for a single day.

See Par. 2 Page 55 R.

See Par. 1 Page 54 and Par 2 Page 55 R.

(7.) That Treasury Decision No. 48 rendered on September 29, 1919 was not in effect on September 16, 1919 when the insured re-enlisted for a third term of service in the Navy, and not being in effect it was not controlling either at the time of his first re-enlistment or at the time of his second re-enlistment just as the Navy Department Circular of November 15, 1918 and January 13, 1919 were not in effect at the time of the insured's first re-enlistment and as contended by the petitioner were not applicable to the case at bar at the time of either re-enlistment on account of the insured's continuous service and being always in a pay status. However, Treasury Decision No. 48 provided that

"authorization of deductions from the insured's pay shall be equivalent of tender." and the Navy Department always had the sailor's written authorization of deduction contained in his application for insurance.

See Par. 1, Page 38 R.

(8.) That War Risk Insurance Circular No. 14 issued by the Navy Department, Bureau of Supplies and Accounts on October 20, 1920 states:

> "The attached War Risk circular letter shall be effective upon receipt thereof except in case of term insurance which is now in effect."

It also stated that:

> "The responsibility for the proper execution of application for Government insurance rests upon commanding officers and commandants."

It also provided that:

> "When term insurance is cancelled or reduced except in conversion (but there is no conversion in this case) a request signed by the insured must be made in duplicate and addressed to the Bureau of War Risk Insurance through the supply officer carrying the insured's pay account."

and there was never any such request signed by the insured sailor. Said War Risk Insurance Circular No. 14 also provided: that upon final discharge "he shall

be instructed to forward Treasury Form 2303 to the Bureau of War Risk Insurance with the first remittance of premium by him," but it will be noted this does not apply to a man like Zimmerman who was continuing actively in the service.

(9.) However, it is to be noted that War Risk Insurance Circular Nos. 1, 3 and 14 of the Navy Department were none of them admitted in evidence by stipulation or in any other way.

See Page 56 R.

ASSIGNMENT OF ERROR No. IV

This petitioner and plaintiff contends that the Court should not assume that the insured was advised that he should give a certified copy of his insurance application to the officer of the pay corps taking up his accounts, which assumption was based upon the presumption of the performance of official duty for the following reasons:

(1.) That the officer of the pay corps no doubt considered, *and rightly so*, that the insured did not come under the provisions of the Navy Department Circular of November 15, 1918 as amended by the Circular of January 13, 1919, since the sailor was in continuous active service, and that checkage of his insurance premiums on term insurance should continue on the payroll while he was in a pay status and this is supported by War Risk Insurance Circular issued by

Navy Department Bureau of Supplies and Accounts on November 21, 1919 wherein it is stated in Paragraph One (1) thereof that:

> "Bureau of War Risk Insurance reports that numerous supply officers are registering Form 6 allotments in payment of premiums on *term insurance*. Attention is called to War Risk Circular No. 1 instruction in which read:
>
> That premium for *term insurance be charged* by checkage on the payroll by the supply officer carrying the pay account of the insured."
>
> *See Opinion of Circuit Court of Appeals Page 97-99 R.*

(2.) That thus the presumption of the performance of official duty is not always a substantial basis for the assumption that certain acts have been done, for it is a well known fact that many duties are not performed through inadvertance, mistake or otherwise.

War Risk Ins. Circular Navy Dept. Dated Dec. 19, 1919.

Par. I War Risk Ins. Circular Navy Dept. Dated Nov. 21, 1919.

ASSIGNMENT OF ERROR No. V

This petitioner and plaintiff contends that the insured sailor having confidence in his written applica-

tion and his Government, did treat his authorization to deduct premiums as continuing during his subsequent enlistments for the reasons that:

(1.) The sailor made his application for insurance and his written authorization to deduct premiums therefor on December 3, 1917 when he knew the time of the enlistment, he was then serving would expire on March 17, 1918, just three and one half months later and so he expected his term insurance to continue in his next enlistments, the premium rate of $6.50 per month being low, and he wished to provide for his mother.

See Page 36 to 41 R.

(2.) The insured never gave any written request whatever over his own signature to revoke his application or to cancel the insurance and there was no evidence whatever of such written request and premiums should have been paid from pay due him.

See Stipulated Facts pages 53 to 58 R.

On July 31, 1933 the Tenth Circuit Court of Appeals held that:

> "Under authority contained in application, not revoked to writing, premiums of War Risk Policy on insured's re-enlistment within 3

months after discharge should have been deducted from pay and paid."

Unger vs. U. S. (C. C. A.-10) 65 Fed. 2nd Se.) 946.

Mortex vs. U. S. 297 Fed. 485-488.

(3.) The sailor having filed his application for insurance with the Government and having authorized in such written application the deduction from his pay of premiums therefor, which application, premium, and contract the Government had accepted, the sailor felt confident that his insurance was continued and particularly since he was in continuous active service with a certificate to that effect and these policies and, the law generally are entitled to the most liberal construction in favor of the soldier (or sailor).

U. S. vs. Cox (C. C. A.-5). 24 Fed. (2nd Se. 799.

(4.) That the sailor being in continuous service during a period of 7 years 3½ months, it was the duty of the officers of the Navy to see that his Insurance was kept alive by the deduction of premiums from his pay as he authorized them to do, or to have advised him that his insurance was lapsing because of failure to pay the premiums, and there is no evidence whatever to show that they did this as the regulations required

them to do, and so the sailor Zimmerman felt satisfied that his insurance was continued.

Railway Mail Assoc. vs. Moore 15 Fed. (2nd Se.) Page 547.

See Par. 3-4-5 War Risk Insurance Circular No. 1 Navy Dept. Dated Nov. 15, 1918

That premiums were not paid on this policy was not the fault of the insured or the beneficiary as it is admitted that the Government had at all times in its possession from the time the policy should have been held to be in effect to the date of the death of the insured, not only money due the insured but sufficient to pay the premiums due on the policy.

Par. 2 Page 55 R.

U. S. vs. LaPage (C. C. A.-1) 59 Fed. (2nd Se.) 167-168.

ASSIGNMENT OF ERROR No. 6

Your petitioner and plaintiff contends that the Circuit Court of appeals erred in holding that the insured sailor's war risk term insurance was cancelled without his written request for the following reasons:

(1.) The regulations provided "that checkage of insurance premium will continue while a man is in a pay status or until the insurance is cancelled by written request over the man's signature forwarded

through the officer of the pay corps carrying his account."

Par. 8 Navy Dept. War Risk Insurance Circular Bureau of Supplies and Accounts. No. 1 Dated Nov. 15, 1918.

Sec. 8, P. 98 R.

(2.) A further and later regulation provided that "when term insurance is cancelled a request signed by the insured must be made in duplicate and addressed to the Bureau of War Risk Insurance carrying his pay account."

See Cancellation in War Risk Ins. Circular No. 14 of Navy Dept. Bureau of Supplies and Accounts Dated Oct. 20, 1920.

ASSIGNMENT OF ERROR No. 7

This petitioner and plaintiff further contends that the United States Circuit Court of Appeals for the Ninth Circuit has followed a severely strict construction of law and regulations instead of construing the law and regulations liberally in favor of the insured so as not to work a forfeiture, annulment or lapse of the insurance policy for the reasons that:

(1). The regulations issued through its War Risk Insurance Circulars, Bureau of Supplies and Accounts, following the sailor's application for insurance and his authorization for the payment of premiums therefor

were too complex and intricate for a sailor to follow and were in fact often misunderstood and improperly carried into effect by the officers themselves.

See War Risk Ins. Circular No. 2 Navy Dept. Bureau of Supplies and Accounts Dated Dec. 19, 1918.

War Risk Ins. Circular Navy Dept. Bureau of Supplies and Accounts Dated Nov. 21, 1919.

(2.) It surely should not be the policy of the Navy Department, Bureau of Supplies and Accounts, to make rules and regulations to break contracts which the sailor had entered into with the Government in good faith and the present decision of the Ninth Circuit Court of Appeals surely lends itself to that proposition, and this should not be the policy of the Courts, particularly since the sailor is in a confidential relation with his Government and in a sense a ward of the Government.

The First Circuit Court of Appeals says:

> "The Government extended to those in the service during the World War every possible benefit and encouragement to protect themselves and their family against want—in case of their death or disability while in the service. The Government *should not stand on narrow techni-*

calities when the good faith of the parties is unquestioned.'

U. S. vs. LaPage (C. C. A.-1) 59 Fed. (2nd Se.) 167.

O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.

(3.) The rule is that Courts do not favor a forfeiture, and when doubts arise as to the proper construction of an insurance contract, that view should be adopted which is most favorable to the insured and will prevent annulment and lapse of his policy.

Insurance Co. vs. Eggleston, 96 U. S. 572; 24 La. Ed. 845.

Thompson vs. Insurance Co. 104 U. S. 260; 26 L. Ed. 768.

Hartford Life and Annuity Insurance Co., vs. Unsell, 144 U. S. 539; 36 La. Ed. 500.

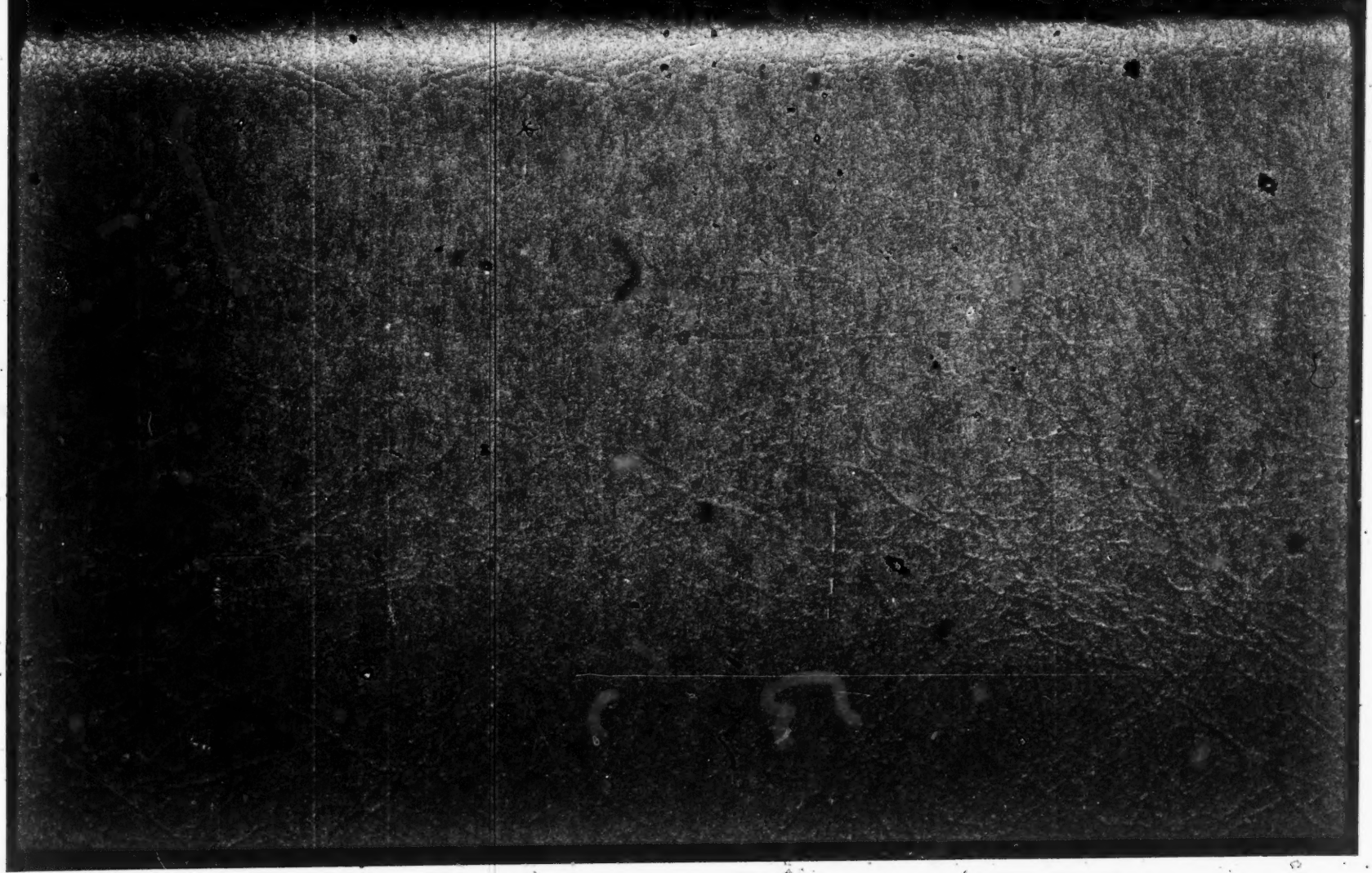
CONCLUSION

Finally, it is in all sincerity, submitted that in justice to this petitioner, the widowed mother of the deceased sailor, and to clear up these special and important questions of War Risk Insurance law and regulations on which there have been conflicting opinions by U. S. Circuit Courts of Appeals and U. S. District Courts and for other reasons mentioned, a Writ of Certiorari should be issued by the United States Su-

preme Court so that this case may be reviewed and a decision rendered by this Court settling these important questions.

Respectfully submitted,

JAMES J. CROSSLEY,
Attorney for Petitioner.



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v.

UNITED STATES OF AMERICA,

[redacted]

BRIEF OF PETITIONER

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Supreme Court of the United States

October Term, 1933

No. 742

BERTHA MEYER SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER

REVIEW ON WRIT OF CERTIORARI OF DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The District Court of Oregon rendered no opinion but entered findings and gave judgment for petitioner. (R. 23-28.) The opinion of the Circuit Court of Appeals (R. 91-102) is reported in 67 Fed. (2d) 412.

JURISDICTION

The judgment of the United States District Court for the District of Oregon was entered on August 9, 1932 (R. 49-52 C. C. A.-9 and 27-28 Sup. Ct.), and the Findings of Fact and Conclusions of law were

rendered on the same date (R. 43-48 C. C. A.-9 and 23-26 Sup. Ct.) The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on November 6, 1933 (R. 102). A petition for re-hearing was denied December 11, 1933 (R. 103). The petition for writ of certiorari was filed in the United States Supreme Court on January 25, 1934 and granted March 5, 1934. Petitioner invokes the jurisdiction of this Supreme Court of the Unites States under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, so that this Court may review and determine this case.

THE QUESTION PRESENTED

The real question presented in this case is whether the War Risk Term Insurance policy issued to Elias Melvin Zimmerman on his application dated December 3, 1917, and on which it appears no premiums were paid after the month of March, 1918 was kept in full force and effect during his continuous active service in the United States Navy from March 18, 1914, to June 30, 1921, during two subsequent re-enlistments without a single day out of active service by reason of an authorization unlimited as to time, for deduction of insurance premiums from active service pay executed during an enlistment extending from March 18, 1914 to March 17, 1918, and not renewed during such continuous subsequent enlistments which authorization

was never revoked in writing and there was always sufficient pay due Elias Melvin Zimmerman to pay the premiums on his insurance, he having continuous service certificate No. 49,689 and he had not been discharged from active naval service of the United States at the time of his death.

STATEMENT OF THE CASE

A jury having been waived the case was tried before the District Court upon the following stipulated facts as shown on Pages 53 to 58 R. C. C. A.-9 and Pages 29-32 Sup. Ct. as follows:

Plaintiff, Bertha Meyer Smith, was the mother of one Elias Melvin Zimmerman, and beneficiary designated in the War Risk Insurance Policy of said Elias Melvin Zimmerman.

That at all times mentioned in the pleadings, the plaintiff was and she now is a citizen of the United States and a resident and inhabitant of the State of Oregon.

Elias Melvin Zimmerman enlisted in the United States Navy on March 18, 1914 at Portland, Oregon, as an apprentice seaman and that he served throughout such enlistment and was honorably discharged therefrom at the expiration thereof on March 17, 1918; that he re-enlisted in the United States Navy on March 18, 1918 and served throughout such enlistment and received an honorable discharge therefrom on Septem-

ber 15, 1919; that he re-enlisted on September 16, 1919, and served thereafter until the date of his death, June 30, 1921.

That Elias Melvin Zimmerman is holder of Continuous Service Certificate No. 49689.

That on the 3rd day of December, 1917, Elias Melvin Zimmerman made application for and was granted a policy of War Risk Insuruance in the amount of $10,000, and that at the time of his application for such insurance, Elias Melvin Zimmermam authorized deductions to be made from his navy pay for the purpose of paying the monthly premiums on his insurance policy in the following words:

> "I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid."

That deductions were made from the pay of Elias Melvin Zimmerman until the expiration of his first enlistment, by which deductions premiums were paid on his insurance policy to and including the month of March, 1918. That thereafter no further deductions for the payment of insurance premiums were made; no further authority for deductions executed and no further premiums ever paid on such insurance.

That pay was due Elias Melvin Zimmerman for

each and every day from and including March 18, 1914, to the official date of his death, June 30, 1921.

That at the time of his discharge on March 17, 1918, and on September 15, 1919, Elias Melvin Zimmerman was paid all the money then due him by the defendant.

That at the time of his death, June 30, 1921, pay was due Elias Melvin Zimmerman, which was later paid to the plaintiff.

War Risk Circular No. 14, S. & A. Circular letter 121-1920, dated October 20, 1920, was issued by the Navy Department, Bureau of Supplies and Accounts, Washington, D. C., on that date.

That in passing upon the question at issue the Court may consider as evidence the depositions and exhibits previously filed in the case.

The following exhibits were admitted in evidence by Stipulation:

Exhibit 1, Bulletin No. 1, War Risk Insurance Bureau.

Exhibit 2, Application for insurance of Elias Melvin Zimmerman, dated December 3, 1917.

Exhibit 3, Treasury Decision No. 33—War Risk Insurance, dated September 20, 1918.

Exhibit 4, Treasury Decision No. 44—War Risk Insurance, dated May 17, 1919.

Exhibit 5, Treasury Decision No. 48—War Risk Insurance, dated September 29, 1919.

Exhibit 6, Letter of Navy Department, dated May 25, 1921. (Included in Stipulation of Facts.)

Exhibit 7, Letter of Navy Department, dated July 8, 1921. (Included in Stipulation of Facts.)

IT WAS FURTHER STIPULATED that a disagreement existed between plaintiff and defendant.

Thereafter the following proceedings were had:

MR. KIMMELL: The record shows there was deduction for the first enlistment for premiums.

COURT: I think the service should be considered as continuous. The question is whether the Government should have deducted the premiums. Of course, payments made to the month after his death would be after the policy had matured. I think you should tender the amount of the premiums, whatever they were.

MR. CROSSLEY: Of course, it is over ten years since he lost his life.

COURT: Yes, but up to the time of his death, when the policy matured, to 1921.

MR. CROSSLEY: June 30, 1921. If your Honor please, I think I would like to add an amendment to our complaint. I think there are five paragraphs and the sixth I would like to add, that plaintiff hereby makes tender of all premiums that may have been due,

if any were due, on the 18th day of March, 1918, to the 30th day of June, 1921.

THE COURT: Yes.

IT WAS FURTHER STIPULATED and AGREED that there was one fact only in controversy, namely: was the War Risk Insurance Policy applied for and obtained by Elias Melvin Zimmerman on December 3, 1917, in force and effect and unterminated on June 30, 1921.

The deposition of Lieutenant Walter Dismukes, taken and filed on behalf of the defendant in Washington, D. C., on December 2, 1929, in addition to the matters stipulated and agreed upon, was in substance as follows:

I am at present in charge of the retainer division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and in such capacity have access to the records relating to enlisted men in the United States Navy; that I have searched such records for the purpose of ascertaining what was disclosed by the records of the enlistments of Elias Melvin Zimmerman. The Navy Department records relating to Elias Melvin Zimmerman, disclose that he never made any allotment for War Risk Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance.

I further examined the records of the enlisted

personnel aboard the United States Ship "Conestoga" with reference to Elias Melvin Zimmerman, and found that the record shows that twelve members of the crew of that ship executed allotments for the payment of premiums on War Risk Insurance, but that no allotment was executed by Zimmerman.

ASSIGNMENTS OF ERROR INTENDED TO BE URGED

The Circuit Court of Appeals erred:

I. In reversing the District Court and in holding that the contract of insurance on the sailor's application for insurance ended with the enlistment in which it was made or any subsequent re-enlistment when the sailor had unbroken continuous service every day for over seven years, was the holder of a continuous service certificate No. 49,689, and his contract for insurance was separate from his enlistment contract.

II. In holding without any evidence to support the same, that the insured sailor, Zimmerman, accepted his full pay, without his insurance premiums being deducted, knowing it to be such.

III. In holding that the sailor did not comply with the requirements of Navy Circular No. 1 of November 15, 1918 and No. 3 of January 13, 1919, and No. 14 of October 20, 1920 and Treasury Decision No. 48 of September 29- 1919 and that this brought about the

cancellation of his insurance contract when said circulars were not introduced in evidence in the Court below and no proof was submitted that they were ever shown to Zimmerman, and part thereof were not applicable and controlling in Zimmerman's status.

IV. In holding that the Court may assume that this sailor was advised that he should give his certified copy of his insurance application to the officer of the Pay Corps having his account when the sailor's service was active and continuous.

V. In holding that the insured sailor did not treat his written authorization to deduct premiums in his application for insurance as continuing in subsequent enlistments, since he wanted and needed the insurance during the war, there being no written request for cancellation of his policy and the insured being the possessor of a continuous service certificate.

VI. In holding that the insured sailor's War Risk Term Insurance was cancelled without his written request or notice to him thereof, there being money due him for active service pay at all times from the Government occupying a fiduciary relation to the sailor, from which to deduct the premiums as he had directed in his written application.

VII. In holding to a severely strict construction of the War Risk Insurance law and regulations when they should be construed liberally.

SUMMARY OF ARGUMENT

Your petitioner respectfully urges upon this Honorable Court that this Court should reverse the decision of the United States Circuit Court of Appeals for the Ninth Circuit and affirm the decision and judgment of the United States District Court for the District of Oregon in favor of the petitioner for the reasons hereinbefore and hereafter set forth:

(1) That the authorization for deduction of premiums from active service did not expire with the enlistment in which it was executed.

(2) That it was not necessary to have such authorization renewed and the Navy Paymaster had full authority and should have deducted the insurance premiums during the subsequent enlistments.

(3) That Zimmerman did not by any writing or otherwise revoke or cancel his policy of insurance or the authorization which he had given for deduction of premiums on his insurance from his active service pay and that the insurance policy in this case was in full force and effect and unterminated on the date of the death of Elias Melvin Zimmerman, then a boatswain's mate, while he was yet in the active service of the Navy on June 30, 1921.

(4) There was always active service pay due Zimmerman from the Government for his active service

from which to deduct the payments for premiums on his insurance authorized in his application without limit as to enlistment. (R. 55 C. C. A.-9 and 30 Sup. Ct.)

(5) That Zimmerman did not understand and there was no proof that he was ever notified that there was any law or regulation which would prevent the Government from deducting the premium as he had authorized and that Zimmerman wanted and needed insurance protection subsequent to his first enlistment since the war was still on and the Government had urged and insisted that soldiers and sailors take out insurance.

(6) That Zimmerman had a Continuous Service Certificate No. 49,689, having served over seven (7) years continuously in the Navy and that not only at the last of each month did he have pay due him enough to pay the premium on his insurance, but that at the time of his death when he was a boatswain's mate he had more than enough due him to pay all of his premiums which the Government had failed to deduct.

(7) The Circuit Court of Appeals of the Ninth Circuit has in this case adopted a rule of severely strict construction in direct conflict with the liberal rule announced by the Supreme Court of the United States and in conflict too with the more liberal rules of most other Courts, particularly in other cases coming under the War Risk Insurance Act.

ARGUMENT

ASSIGNMENT OF ERROR No. 1

This plaintiff and petitioner contends that the contract of insurance on the sailor's application did not expire with the enlistment in which it was made or his subsequent enlistments for the reason that:

(1) The enlistment contract applied to service only, while the contract of insurance, based upon the application therefor, was separate and distinct and made at a different time. (R. 36-42 C. C. A.-9 and 19-22 Sup. Ct.)

Mortex vs. United States 297 Fed. 485.
O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.
Unger vs. U. S. (C. C. A.-10) 65 Fed. (2nd Se.) 946.

(2) There was no limit as to the time the contract of insurance should run stated in the application of the insured, which application was accepted by the Government, and there was no time limit upon the authorization to deduct premiums for the insurance. (R. 36-42 C. C. A.-9 and 19-22 Sup. Ct.)

(3) The insured sailor had a Continuous Service Certificate No. 39,689 and he had at the time of his death been serving for more than seven (7) years in the Navy of the United States from March 18, 1914 to the date of his death, June 30, 1921. (R. 54 C. C. A.-9 and 29 Sup. Ct.)

(4) When a sailor was discharged and left the service he could still keep up his insurance without a new application for contract of insurance and if he re-enlisted after being out of the service for sometime, all he needed to do was to present a certified copy of his insurance application and have his insurance continued..

See II War Risk Ins. Circulars No. 1 Navy Dept. Dated Nov. 15, 1918.

No. 3, Dated January 13, 1919.

No. 14, Dated October 20, 1920.

All by the Navy Department, Bureau of Supplies and Accounts.

ASSIGNMENT OF ERROR No. II.

This plaintiff and petitioner contends that the insured sailor did not accept his full pay without his insurance premiums being deducted knowing it to be such, for the following reasons:

(1) That there was no evidence in this case whatever to show that Zimmerman, the insured, knew that he was paid in full without his insurance premiums being deducted. either monthly or at the end of his enlistments.

(2) That Zimmerman's pay varied from time to time since he was making an allotment to his mother, which varied from time to time.

(3) That any purchases by the insured from the Ship Stores on board ship would be deducted from his pay, and that, too, would make the amount of the pay he himself received vary from time to time.

ASSIGNMENT OF ERROR No. III.

This petitioner and plaintiff contends that Circular No. 1 of the Navy Department, Bureau of Supplies and Accounts dated November 15, 1918 as amended by Circular No. 3 of January 13, 1919 and Circular No. 14 of October 20, 1920 and Treasury Decision No. 48 were not sufficiently applicable to and controlling in the case at bar to cancel and terminate the insurance of this sailor for the reasons that:

(1) Circular No. 1 of November 15, 1918 was not in effect and therefore could not apply to the re-enlistment of the insured on March 18, 1918.

(2) Considering this Circular No. 1 of November 15, 1918 to have been in effect on September 16, 1919 when the sailor re-enlisted a second time it provided in Paragraph 8 thereof as follows:

> "Checking of insurance premium will continue while a man is in a pay status or until the insurance is cancelled by written request over the man's signature forwarded to the officer of the Pay Corps carrying his account." (R. 98.)

(3) There was never a written request over Zimmerman's signature to cancel his insurance, and no

proof whatever of such request. (R. 53-58 C. C. A.-9 and 29-32 Sup. Ct.)

(4) That the discharge spoken of in Par. 11 of Navy Circular No. 3, January 13, 1919 referred particularly to men who left the service as it provided for payment of premiums *when the Government pay ceases* which Zimmerman's never did and it provided for the first remittance of premium by the insured *himself* and not through the Paymaster, unless he re-enlisted at a later date, (R. 98-99) and the Second Circuit Court of Appeals sets forth a part of Treasury Bureau of War Risk Insurance Form 2303 which stated:

> "After discharge from the service *when the Government pay ceases*, you should send check or money order drawn to the Treasurer of the United States, to the Disbursing Clerk, Bureau of War Risk Insurance, Treasury Department, Washington, D. C."

Sawyer vs. U. S. (C. C. A.-2) 10 Fed. (2d) 416.

(5) The officer of the Pay Corps already had the insured's pay account, and if the sailor continued in service as he did, the checkage would be continuous instead of a first checkage by the Paymaster. (R. 98.)

(6) That Treasury, Bureau of War Risk Insurance, Form 2303, containing information relative to com-

pensation and continuation of War Risk Insurance was intended to be filled out in duplicate in the event a sailor was finally discharged and went out of the service for sometime, and this applied too, to the certified copy of his insurance application, as it will be noted he was to be instructed to forward these papers direct to the Bureau of War Risk Insurance with his first remittance or premium, when the insured was out of active service and out of a pay status, but this did not apply to Zimmerman as he was always on a pay status and was never out of active service for a single day. (R. Par. 1-54 and Par. 2-55 C. C. A.-9 and Par. 4-29 and Par. 2-30 Sup. Ct.)

(7) That Treasury Decision No. 48 rendered on September 29, 1919 was not in effect on September 16, 1919 when the insured re-enlisted for a third term of service in the Navy, and not being in effect it was not controlling either at the time of his first re-enlistment or at the time of his second re-enlistment just as the Navy Department Circular of November 15, 1918 and January 13, 1919 were not in effect at the time of the insured's first re-enlistment and as contended by the petitioner were not applicable to the case at bar at the time of either re-enlistment on account of the insured's continuous service and being always in a pay status. However, Treasury Decision No. 48 provided that "authorization of deductions from the insured's pay shall be equivalent of tender," and the Navy De-

partment always had the sailor's unrevoked written authorization of deduction contained in his application for insurance. (R. 38-42 C. C. A.-9 and 19-22 Sup. Ct.)

(8) That War Risk Insurance Circular No. 14 issued by the Navy Department, Bureau of Supplies and Accounts, on October 20, 1920, although not in effect at the time of Zimmerman's second re-enlistment on September 16, 1919, provided:

> "The attached War Risk circular letter shall be effective upon receipt thereof except in case of term insurance which is now in effect."

It also stated that:

> "The responsibility for the proper execution of application for Government insurance rests upon commanding officers and commandants."

It also provided that:

> "When term insurance is cancelled or reduced except in conversion (but there is no conversion in this case) a request signed by the insured must be made in duplicate and addressed to the Bureau of War Risk Insurance through the supply officer carrying the insured's pay account."

and there was never any such request signed by the insured sailor. Said War Risk Insurance Circular No. 14 also provided: that upon final discharge "he shall be instructed to forward Treasury Form 2303 to the

Bureau of War Risk Insurance with the first remittance of premium by him," but it will be noted this does not apply to a man like Zimmerman who was continuing actively in the service.

(9) However, it is to be noted that War Risk Insurance Circulars Nos. 1, 3, and 14 of the Navy Department and Treasury Form 2303 were none of them admitted in evidence by stipulation or in any other way and no proof that they were ever shown to the sailor, Zimmerman. (R. 56 C. C. A.-9 and 30-31 Sup. Ct.)

(10) Attention is called to the provisions of Sec. 13, Chapter 105 (40 Statute at Large 399 and 555) which provide that the Director of the War Risk Insurance Bureau and the Secretary of the Treasury Department could make regulations under the Insurance Act, and surely the Navy Department could not issue regulations that would deprive Zimmerman of his rights under his contract with the Government.

(11) Furthermore, Treasury Decision 48 of September 29, 1919, which incorporated Treasury Decision 33 of September 20, 1918, and in full force and effect provided "insurance will not be permitted to lapse for non-payment of premiums *while the insured is in the active, military, or naval service* and premiums therefor are authorized to be deducted from the insured's pay or deposits."

ASSIGNMENT OF ERROR No. IV.

This petitioner and plaintiff contends that the Circuit Court of Appeals should not have assumed that the insured was advised that he should give a certified copy of his insurance application to the officer of the Pay Corps taking up his accounts, which assumption was based upon the presumption of the performance of official duty (R. 99) for the following reasons:

(1) That the officer of the Pay Corps no doubt considered, and rightly so, that the insured did not come under the provisions of the Navy Department Circular of November 15, 1918 as amended by the Circular of January 13, 1919, since the sailor was in continuous active service, and that checkage of his insurance premiums on term insurance should continue on the payroll while he was in a pay status and this is supported by War Risk Insurance Circular issued by Navy Department, Bureau of Supplies and Accounts on November 21, 1919 after Zimmerman's second reenlistment on September 16, 1919, wherein it is stated in Paragraph One (1) thereof that:

> "Bureau of War Risk Insurance reports that numerous supply officers are registering Form 6 allotments in payment of premiums on term insurance. Attention is called to War Risk Circular No. 1 instruction in which read:
>
> That premium for term insurance be charged by checkage on the payroll by the supply officer

carrying the pay account of the insured."

Also

Par. 1 and 4 War Risk Ins. Circular No. 2, Navy Dept. dated December 19, 1918.

(2) Thus the presumption of the performance of official duty is not always a substantial basis for the assumption that certain acts have been done, for it is a well known fact that many duties are not performed through inadvertance, mistake or otherwise.

ASSIGNMENT OF ERROR No. V.

This petitioner and plaintiff contends that the insured sailor having confidence in his written application and his Government, did treat his authorization to deduct premiums as continuing during his subsequent enlistments for the reasons that:

(1) The sailor made his application for insurance and his written authorization to deduct premiums therefor on December 3, 1917 when he knew the time of the enlistment, he was then serving would expire on March 17, 1918, just three and one-half months later and so he expected his term insurance to continue in his next enlistments, as the war was still raging, the premium rate of $6.50 per month being low, and he wished to provide for his mother. (R. 36-42 C. C. A.-9 and 19-22 Sup. Ct.)

Bulletin No. 1 War Risk Insurance Bureau issued

October 15, 1917, ander authority of Section 13 and the direction contained in Section 402 War Risk Insurance Act provided that the Government

> "hereby insures from and after the.....day of....., 19....., John Doe of Illinois, Private Co. A, Third Infantry, conditioned up the payment of premiums as herein provided"

and there was no limit to any one enlistment. Said bulletin also provided that:

> "premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him from the United States or deposited by him with the United States and, if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium"

and there was no limit as to any one enlistment and Zimmerman in his application for insurance, signed December 3, 1917, which was a part of his contract with the Government, provided by Section 202, War Risk Insurance Circular, stated specifically

> "I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States in payment of the premiums as they become due, unless they be otherwise paid"

and it is to be noted there was no limit in such authorization to any one enlistment, and there was no authority to pay the premiums otherwise.

(2) The insured never gave any written request whatever over his own signature to revoke his application or to cancel the insurance and there was no evidence whatever of such written request and premiums should have been paid from pay due him. (R. 53-58 C. C. A.-9 and 29-32 Sup. Ct.)

On July 31, 1933 the Tenth Circuit Court of Appeals held that:

> "'Under authority contained in application, not revoked in writing, premiums of War Risk Policy on insured's re-enlistment within three months, after discharge should have been deducted from pay and paid."
>
> *Unger vs. U. S.* (C. C. A.-10) 65 Fed. (2nd Se.) 946.
>
> *Mortex vs. United States* 297 Fed. 485-488.
>
> *O'Neill vs. U. S.* 32 Fed. (2nd Se.) 313.

(3) The sailor having filed his application for insurance with the Government and having authorized in such written application the deduction from his pay of premiums therefor, which application, premium, and contract the Government had accepted, the sailor felt confident that this insurance was continued and particularly since he was in continuous active service with a certificate to that effect and these policies and,

the law generally are entitled to the most liberal construction in favor of the soldier or sailor.

U. S. vs. Cox (C. C. A.-5) 24 Fed. (2d) 799.

(4) That the sailor being in continuous service during the period of 7 years 3½ months, it was the duty of the officers of the Navy to see that his insurance was kept alive by the deduction of premiums from his pay as he authorized them to do, or to have advised him that his insurance was lapsing because of failure to pay the premiums, and there is no evidence whatever to show that they did this as the regulations required them to do as Par. 4 War Risk Insurance Circular No. 1, Navy Dept., Bureau of Supplies and Accounts, dated November 15, 1918, provided that:

> "The responsibility for the proper checkage of insurance premiums rests on the officer of the Pay Corps carrying the account against which the premium is to be charged"

and so the sailor, Zimmerman, felt satisfied that his insurance was continued.

Railway Mail Assoc. vs. Moore 15 Fed. (2d) 547.

(5) That premiums were not paid on this policy was not the fault of the insured or the beneficiary as it is admitted that the Government had at all times in its possession from the time the policy was in effect to the date of the death of the insured, then a boatswain's

to pay the premiums due on the policy. (R. Par. 2-55 C. C. A.-9 and Par. 2-30 Sup. Ct.)

O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.
U. S. vs LaPage (C. C. A.-1) 59 Fed.)2d) 167-168.

ASSIGNMENT OF ERROR No. VI.

Your petitioner and plaintiff contends that the Circuit Court of Appeals erred in holding that the insured sailor's War Risk Term Insurance was cancelled without his written request for the following reasons:

(1) The regulations provided "checkage must be made on the Navy Pay Roll of premium for every application for insurance executed by officers or men of the Navy. *Checkage of insurance premium will continue while a man is in a pay status* or until the insurance is cancelled by written request over the man's signature forwarded through the officer of the Pay Corps carrying his account." (R. Sec. 8, 98.)

Par. 8, Navy Dept. War Risk Insurance Circular No. 1, dated Nov. 15, 1918, Bureau of Supplies and Accounts.

(2) A further and later regulation provided that

"When term insurance is cancelled a request signed by the insured must be made in duplicate and addressed to the Bureau of War Risk Insurance via the Supply Officer carrying his pay account."

See "'Cancellation" in War Risk Ins. Circular No. 14 of Navy Dept., Bureau of Supplies and Accounts, dated Oct. 20, 1920.

(3) The case of *Sawyer vs U. S.* 10th Fed. (2d) 416, decided against the benificiary by the Second Circuit Court of Appeals has been quoted as in accord with the ruling of the Ninth Circuit Court of Appeals in this case, but while it was a Navy case it is not at all like this case at bar for the reason that Sawyer had been *finally* discharged from active service in the Navy with no active service pay due him and he was in the reserve where he had to look after his own insurance and he allowed his premiums to be in default, an entirely different status than that of Zimmerman, the sailor, in this case who had continuous active service and he died in that status with pay always due him sufficient to pay his premiums.

Also the case of *U. S. vs. Barry* 67 Fed. (2d) 763 decided against the beneficiary by the Sixth Circuit Court of Appeals, has been quoted as in accord with the decision of the Ninth Circuit Court of Appeals in this case, but it is not like this case at bar for the reason that in that case Barry had been promoted to be an officer whereupon he made special allotments, was finally discharged with no active service pay due him and he allowde his premium payments to default, an entirely different status than that of Zimmerman,

the sailor in this case, who had continuous active service as an enlisted man, being boatswain's mate at the time of his death, and having pay always due him.

In the case of *Crawford vs. U. S.* 291 Fed. Page 801-805, sometimes referred to as in accord with the decision of the United States Circuit Court of Appeals for the Ninth Circuit, it is to be particularly noted that while this was a case of a sailor in the Navy, Chawford had been discharged from active service and became a member of the United States Naval Reserve and had "retainer" pay coming to him but not active service pay. In this case too, he had been *released and finally discharged from active service* and fully paid for all services rendered including a Sixty ($60:00) Dollar bonus and he was given a written notice, War Risk Insurance Form 2303, which notice advised him that *when his government pay ceased* he should send his insurance premium by check or money order to the Secretary of the Treasurer of the United States promptly on the 1st of each month, otherwise his insurance would become void, while in this case of Zimmerman's the sailor was never finally released or discharged from active service and his *Government active service pay never ceased* during the whole of more than 7 years service in the avy until the date of his death, June 30, 1921.

ASSIGNMENT OF ERROR No. VII.

This petitioner and plaintiff further contends that the United States Circuit Court of Appeals for the Ninth Circuit has followed a severely strict construction of law and regulations instead of construing the law and regulations liberally in favor of the insured so as not to work a forfeiture, annulment or lapse of the insurance policy for the reasons that:

(1) The very purpose of the Congress in passing the War Risk Insurance Act was "to give insurance to those who entered the military and naval service and to protect those who were dependent upon them", and further the Eighth Circuit Court of Appeals has stated "great latitude should be allowed in order to give effect to the acts and intentions of those in military service in time of war", for surely the Government should keep faith with its dead.

Helmholz vs. Horst (C. C. A.-6) 294 Fed. 417-420.

Johnson vs. White (C. C. A.-8) 39 Fed. (2d) 797.

(2) In the first place the regulations issued through its War Risk Insurance Circulars, Bureau of Supplies and Accounts, by the Navy Department, following the sailor's application for insurance and his authorization for the payment of premiums therefor were too complex and intricate for a sailor to follow

and were in fact often misunderstood and improperly carried into effect by the officers themselves as shown in Paragraph 1 of Assignment of Error No. IV, hereinbefore set forth.

See War Risk Ins. Circular No. 2, Navy Dept., Bureau of Supplies and Accounts, dated Dec. 19, 1918.

War Risk Ins. Circular, Navy Dept., Bureau of Supplies and Accounts, dated Nov. 21, 1919.

(3) The Supreme Court of the United States has adopted a rule of liberal construction in War Risk Insurance Acts.

White vs. U. S. 270 U. S. 175, 46 Supreme Court Reports 274, 70 Law Edition 530.

(4) The Circuit Court of Appeals for the Ninth Circuit in the case at bar has in reversing the judgment of the District Court for the District of Oregon adopted a rule of severely strict construction directly in conflict with the liberal rule announced by the Supreme Court and other Circuit Courts of Appeals.

U. S. vs. Cox 24th Fed. (2d) 799.

Johnson vs. White (C. C. A.-8) 39 Fed. (2d) 793.

U. S. vs. Tyrakowski (C. C. A.-7) 50 Fed. (2d) 766.

U. S. vs. Perry (C. C. A.-8) 55 Fed. (2d) 819.

U. S. vs. Lesher (C. C. A.-9) 59 Fed. (2d) 53.

(5) It surely should not be the policy of the Navy Department, Bureau of Supplies and Accounts, to make rules and regulations to break contracts which the sailor had entered into with the Government in good faith and the present decision of the Ninth Circuit Court of Appeals surely lends itself to that proposition, and this should not be the policy of the Courts, particularly since the sailor is in a confidential relation with his Government and in a sense a ward of the Government.

The First Circuit Court of Appeals says:

> "The Government extended to those in the service during the World War every possible benefit and encouragement to protect themselves and their family against want—in case of their death or disability while in the service. *The Government should not stand on narrow technicalities* when the good faith of the parties is unquestioned."

U. S. vs. LaPage (C. C. A.-1) 59 Fed. (2d) 167.

O'Neill vs. U. S. 32 Fed. (2d) 313.

(6) The rule is that Courts do not favor a forfeiture, and when doubts arise as to the proper construction of an insurance contract, that view should be adopted which is most favorable to the insured and will prevent annulment and lapse of his policy.

Hartford Life and Annuity Insurance Co., vs. Unsell, 144 U. S. 539; 36 La. Ed. 500.

Insurance Co. vs. Eggleston, 96 U. S. 572; 24 La. Ed. 845.

Thompson vs. Insurance Co., 104 U. S. 260; 26 L. Ed. 768.

CONCLUSION

WHEREFORE, your petitioner and plaintiff in this case at bar urges upon this Honorable Court, the final arbiter of these important and far reaching questions that will effect so many widowed mothers and other needy relatives of deceased World War Veterans, a reversal of the decision of the United States Circuit Court of Appeals for the Ninth Circuit and an affirmance of the judgment of the United States District Court for the District of Oregon holding:

1) That the contract for insurance on the sailor, Zimmerman's application did not expire with the enlistment in which it was executed or his subsequent re-enlistment.

(2) That the authorization for deduction of premiums from active service pay did not expire with the enlistment in which it was executed or his subsequent re-enlistment and it was not necessary to have such authorization, unlimited as to time, renewed upon each subsequent continuing re-enlistment.

(3) That Zimmerman had a Continuous Service Certificate No. 49-689, having served

continuously in the Navy without missing a single day for over seven years.

(4) That the sailor, Zimmerman, always had *active service pay due him sufficient to pay the premium* on his insurance and that at the time of his death he had *more than enough active service pay* due him to pay accrued premiums, which the Government failed to deduct.

(5) That Zimmerman did not by writing or otherwise revoke or cancel his policy of insurance or the unlimited authorization which he had given for deduction of premiums on his insurance from his active service pay, and that he wanted and needed the insurance and did not understand that there was any law or regulation that would prevent the Government from deducting the premium as he had authorized or that the Government could cancel his contract for insurance without due notice to him.

(6) That the Navy Pay Master had full authority and should have deducted the insurance premium during the subsequent enlistments.

(7) That the Insurance Policy in this case together with the authorization to deduct premiums from his *active service pay* were in full force and effect and unterminated on the date of the death of Elias Melvin Zimmerman, while he was still in the *active service* of the Navy on June 30, 1921 when he together with all others on board the U. S. S. Conestoga went down to their eternal sleep in the great Pacific and the beneficiary, Bertha Meyer Smith, the deceased

sailor's widowed mother, should be paid the amount due on his War Risk Insurance Policy.

Respectfully submitted,

JAMES J. CROSSLEY,
Attorney for Petitioner and Plaintiff.

Supreme Court of the United States

October Term, 1933

No. 742

BERTHA MEYER SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF PETITIONER FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Bertha Meyer Smith, the petitioner herein, by her counsel, James J. Crossley, and moves and requests this Honorable Court for leave and permission to proceed in completing the presentation of this action in forma pauperis on the ground that the petitioner having put forth every effort possible to pay the costs to this day, finds herself unable to secure and pay the necessary remaining costs for the printing of the record and other expenses for a complete submission of the action to this Honorable Court, as is fully shown by the supporting affidavits hereto attached marked Exhibits "A" and "B" and made a part hereof, all as provided and required by Section 1626 United

States Compiled Statutes, Annotated, 1923, act of June 27, 1922.

Dated at Portland, Oregon this 21st day of March, 1934.

JAMES J. CROSSLEY,
Attorney for Petitioner.

AFFIDAVIT SUPPORTING MOTION TO PROCEED IN FORMA PAUPERIS

EXHIBIT "A"

UNITED STATES OF AMERICA,
DISTRICT OF OREGON,
SUPREME COURT OF THE UNITED STATES,
ON WRIT OF CERTIORARI FROM
UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT,
MULTNOMAH COUNTY, OREGON.

I, Bertha Meyer Smith, the petitioner above named, being duly sworn on oath depose and say that I am a citizen of the United States and a resident of the City of Portland, Multnomah County, Oregon, and have been such for the past twenty-two (22) years, and to the best of my knowledge and belief the allegations set forth in my petition and reply wherein I ask that the Government be required to pay me the insurance due me as beneficiary on the War Risk Insurance

Policy taken out by my son, Elias Melvin Zimmerman, on or about December 3, 1917, for the sum of $10,000.00 and on which in his application therefor he had authorized the Government and Naval authorities to take out their premium of the Six Dollars and Fifty Cents ($6.50) per month without any limitation on the same upon his two succeeding re-enlistments, which insurance I contend was in force and effect on June 30, 1921 at the time he lost his life at sea even though the Naval Paymaster had not taken out the monthly premiums as directed in said application, are true, and that I am entitled to the redress sought by this action and that his order to pay the premiums on the insurance policy continued over each successive re-enlistments to the best of my belief;

That owing to poverty I am not able to bear the further costs of this action for the reasons that I have heretofore put forth every effort possible in securing the money by working and borrowing the same wherever I could borrow it to pay the costs and expenses of printing in the District and Circuit Courts of Appeals and the Seventy-five Dollars ($75.00) already paid into this court, and I am now unable to borrow any more money with which to pay the remaining One Hundred Thirty-five Dollars ($135.00) cost for the printing of the record;

That the only income I have is Twenty Dollars

($20.00) per month compensation from the Government with which to live and it takes all of this with which to buy my food and fuel;

That I have a small home which is appraised by the appraisers of the Home Owners Loan Association for Thirteen Hundred Sixty Dollars ($1360.00) on which I am trying to get a loan from the said Home Owners Loan Association to pay off a Fifteen Hundred Dollar ($1500.00) mortgage which is long past due, together with interest for the past two (2) years and I have been advised that I can only secure the sum of Ten Hundred Twenty-five Dollars ($1025.00) from said Home Owners Loan Association to pay on said mortgage; that I own no other property either personal or real;

That I am a widow and was such at the time of the death of my son, Elias Melvin Zimmerman, who was at the time of his death making allotment to me of one-half of his pay in the Navy;

That I have no one to give me support and that my son, Elias Melvin Zimmerman, whose life was lost at sea in 1921 and for whose insurance I am now asking the Government to pay me, was at that time my sole and only support.

BERTHA MEYER SMITH,
Affiant.

Subscribed and sworn to before me this 21st day of March, 1934.

(Seal)

DAVID E. LOFGREN,
Notary Public for Oregon.
My Commission Expires July 12, 1935.

STATE OF OREGON, }
County of Multnomah } ss.

BE IT REMEMBERED, That on this 21st day of March, 1934, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Bertha Meyer Smith, who is known to me to be the identical person described in and who executed the within instrument and acknowledged to me that she executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and notarial seal the day and year last above written.

DAVID E. LOFGREN,
Notary Public for Oregon.
My Commission Expires July 12, 1935.

(Seal)

UNITED STATES OF AMERICA,
DISTRICT OF OREGON,
SUPREME COURT OF THE UNITED STATES,
ON WRIT OF CERTIORARI FROM UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT,
MULTNOMAH COUNTY, OREGON.

AFFIDAVIT SUPPORTING MOTION TO PROCEED IN FORMA PAUPERIS

EXHIBIT "B"

I, James J. Crossley, being duly sworn on my oath do depose and say that I am a citizen of the United States, having been born in the State of Iowa, and am an attorney at law, practicing in the City of Portland for the past nineteen (19) years except three (3) years I was in the United States Army and in France and Germany during part of which time I served as Judge Advocate of the 42nd (Rainbow) Division and 6th (Regular Army) Division, having previously served as an officer in the Infantry of the Army, and before that practicing some eight (8) years in Iowa and then six (6) years and one-half as United States Attorney in Alaska, and that I have been admitted to practice in the State and Federal Courts of Iowa, Alaska, and Oregon and in the Circuit Court of Appeals for the Ninth Circuit and in this the Supreme Court of the United States;

That I am attorney for the petitioner and have read over her affidavit supporting her motion to proceed and complete the submission of this action in forma pauperis from this date she having paid the costs and all expenses up to the present time, Seventy-five Dollars ($75.00) of which was in this court and her statements in her affidavits that she is unable to borrow and secure the One Hundred Thirty-five Dollars ($135.00) to pay the remaining costs in this court for the printing of this record is true to the best of my knowledge and belief and likewise her statements set forth in her affidavit as to her financial status are true to the best of my knowledge and belief.

That I myself am paying part of the expenses of the trip to Washington to appear before this Honorable Court to present argument in said action and if the remainder of said expense is paid, the funds will have to be furnished by someone else other than the petitioner and I am myself unable to pay the costs of printing of the record.

All of which is true as I verily believe.

JAMES J. CROSSLEY,
Affiant.

Subscribed and sworn to before me this 212st day of March, 1934.

(Seal)

DAVID E. LOFGREN,
Notary Public for Oregon.
My Commission Expires July 12, 1935.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 742

BERTHA MEYER SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 91–102) is reported in 67 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 6, 1933. (R. 102.) A petition for rehearing was denied December 11, 1933. (R. 103.) The petition for writ of certiorari was

filed January 25, 1934. Although she does not so state, the petitioner presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a war risk insurance contract issued December 3, 1917, on the application of the insured, had lapsed for nonpayment of premiums when the insured died on June 30, 1921, the facts being that although the insured in his application for insurance authorized monthly deductions from his service pay for the payment of the premiums, he did not renew this authorization at the beginning of his second and third enlistments on March 18, 1918, and September 16, 1919; and that during these enlistments he received his full pay without deduction for the premiums, and did not himself pay the premiums.

STATEMENT

The complaint in this case, which was filed in the District Court for the District of ~~Washington~~ Oregon, alleged that a contract of war-risk term insurance in the principal amount of $10,000 was issued by the United States to one Elias Melvin Zimmerman on or about December 3, 1917, and that this contract remained in force by reason of an authorization for deduction of premiums from service pay until Zimmerman's death while in the service on June

30, 1921. (R. 7–9.) The plaintiff (petitioner herein) was the mother and designated beneficiary of the insured. (R. 7, 43, 53.)

A jury was waived by stipulation in open court (R. 42), and it was stipulated that the only matter in controversy was whether the insurance was in force on June 30, 1921, when the insured died. (R. 57.) The pertinent facts, as stipulated by the parties (R. 53–57) and as found by the District Court (R. 43–48), are as follows:

Zimmerman, the insured, served three successive enlistments in the United States Navy from March 18, 1914, to March 17, 1918; from March 18, 1918, to September 15, 1919; and from September 16, 1919, until June 30, 1921, the date of his death. (R. 43, 54.) He was the holder of a continuous service certificate. (R. 44, 54.)

In the application for war risk insurance, executed by Zimmerman on December 3, 1917, there was contained the following provision (R. 45, 55):

> I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid.

The premiums due on the insurance were deducted from Zimmerman's service pay to and including the month of March, 1918, but beginning with his second enlistment, on March 18, 1918, no further deductions were made from his service pay

nor did he execute any further authorizations for deductions or make any payment of premiums himself. (R. 46, 55.) Service pay was due Zimmerman for each and every day of the period from March 18, 1914, to June 30, 1921, the date of his death. (R. 45, 55.)

At the time of discharge from his first enlistment on March 17, 1918, and again on September 15, 1919, when his second enlistment terminated, all money then due Zimmerman was paid to him. The pay due Zimmerman at the time of his death on June 30, 1921, was paid to the petitioner, his mother. (R. 46, 55.)

The only evidence introduced in addition to that stipulated was the deposition of Lieutenant Dismukes, who stated that he had access to the records relating to the enlisted men in the Navy, and that he found upon a search of those records that Zimmerman had never made any allotment for war risk insurance premiums after his original application for insurance, although twelve members of the crew of the U.S.S. *Conestoga,* on which he was serving at the time of his death, had executed such allotments. (R. 57–58.)

The District Court entered judgment for the petitioner. (R. 71.) While it rendered no opinion, its conclusions of law (R. 48) indicate that it considered that the authorization for deduction of premiums from service pay, contained in the original application for insurance executed December 3, 1917, remained in effect during the subsequent

enlistments, and therefore continued the insurance in force, although the insured executed no further authorizations for deductions from service pay for payment of premiums, no deductions were actually made, and no premiums paid by the insured himself.

On appeal the judgment for the petitioner was reversed by the Circuit Court of Appeals for the Ninth Circuit, that court holding that the authorization for deduction of premiums from service pay which was executed on December 3, 1917, ceased to be effective on the expiration of the enlistment in which it was executed (March 17, 1918), and further that (R. 101):

> the insured, by accepting the money which the appellee now claims should have been appropriated to the payment of the premium of the war risk insurance, in effect consented to an abandonment of his policy for his acceptance of the money which belonged to the government, if the insurance was in effect, cannot be considered otherwise than as a consent to the abandonment of the contract of insurance on his part and an agreement that the policy should be considered as lapsed.

It therefore held that the insurance was not in force when the insured died on June 30, 1921.

DISCUSSION

The decision rendered by the Circuit Court of Appeals in the instant case is in accord with that reached by the Circuit Court of Appeals for the

Sixth Circuit in *United States* v. *Barry*, 67 F. (2d) 763, and with the decision of the Circuit Court of Appeals for the Second Circuit in *Sawyer* v. *United States*, 10 F. (2d) 416, but is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Unger* v. *United States*, 65 F. (2d) 946. See also *O'Neill* v. *United States*, 32 F. (2d) 313 (D.Mass.).

In the *Unger* case, *supra*, the insured enlisted in the Army on May 28, 1919, was honorably discharged June 17, 1919, reenlisted on July 8, 1919, and was again honorably discharged July 7, 1920. During the period of his first enlistment he applied for and obtained a contract of war risk insurance. Pursuant to authorization contained in the application for insurance, premiums were deducted from the insured's service pay during the entire period of his first enlistment. Upon reenlistment premiums were not deducted or otherwise paid. The Circuit Court of Appeals for the Tenth Circuit held that the authorization for deduction of premiums from service pay executed during the first enlistment remained in effect during the second enlistment and that, as the soldier was entitled to continuous service pay, from which deductions could have been made for the premiums, they should be treated as paid even though deductions were not in fact made.

The Government did not apply for certiorari in the *Unger* case, for the reason, among others, that

as the case was remanded for a new trial without the court passing upon the sufficiency of the evidence to support the judgment, the question decided might not arise upon a second trial in view of an allegation in the complaint that the insured was permanently and totally incapacitated prior to his first discharge.

Petitioner also alleges that the decision of the Circuit Court of Appeals in the instant case is in conflict with that of the Circuit Court of Appeals for the First Circuit in the case of *United States* v. *LePage*, 59 F. (2d) 165, but we do not think that that case is in point. The question there decided related to an application for war risk insurance made on behalf of the soldier by a third party on the last day of the statutory period within which applications might be received. The application was ratified by the soldier after the expiration of the statutory period, and the opinion was concerned primarily with the question whether the application was timely executed. That case did not present the question whether an authorization for deduction of premiums from service pay executed during one enlistment is effective during a subsequent enlistment.

Because we regard the *Unger* decision as in conflict with the decision of the Circuit Court of Appeals herein, we do not oppose the granting of the petition. Further, it cannot be said that the question is not of importance as there are now

pending in the various District Courts about 9,000 war risk insurance cases and, according to information furnished by the Veterans' Administration, the continuation of insurance contracts in subsequent enlistments is involved in approximately five percent of the pending suits. There is, therefore, a reasonable probability that the question herein involved may arise in a considerable number of cases.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
WILL G. BEARDSLEE,
WILBUR C. PICKETT,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

FEBRUARY, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 742

BERTHA MEYER SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 47–58) is reported in 67 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 6, 1933 (R. 58). A petition for rehearing was denied December 11, 1933 (R. 59). The petition for writ of certiorari was filed January 25, 1934, and was granted March 5, 1934 (R. 63). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an authorization for deduction of premiums from pay or deposit executed by a sailor on December 3, 1917, kept in force until his death on June 30, 1921, a contract of war risk insurance without premium deductions having been made or premiums having been otherwise paid after his discharge from his first enlistment on March 17, 1918, and without renewal of the authorization for premium deductions or any other action affecting the insurance during two subsequent periods of continuous naval service beginning March 18, 1918, and September 16, 1919, in which he received his pay in full.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 34–50.

STATEMENT

The complaint filed by petitioner in the District Court of the United States for the District of Oregon in May 1929 alleged that the United States issued to Elias Melvin Zimmerman on December 3, 1917, a contract of war risk insurance of which petitioner, the mother of the insured, was the designated beneficiary and that by reason of an authorization for deduction of premiums from pay or deposit the insurance was in force on June 30, 1921, when Zimmerman died (R. 1–3).

A jury was waived by agreement in open court (R. 23) and it was stipulated that the sole question in controversy was whether the insurance was in force at the time of the insured's death (R. 23).

There is no dispute as to the pertinent facts. As stipulated (R. 29–31) and as found by the District Court (R. 23–26) they are as follows:

Zimmerman served three enlistments in the United States Navy—March 18, 1914, to March 17, 1918; March 18, 1918, to September 15, 1919; September 16, 1919, to his death on June 30, 1921—and was the holder of a continuous service certificate (R. 23, 29).

War-risk insurance in the sum of $10,000 was issued to Zimmerman on an application executed December 3, 1917, containing the following authorization (R. 23–24, 29–30):

> I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid.

Deductions were made from Zimmerman's pay during his first enlistment, the last deduction covering the premium due for the month of April 1918 (R. 25, 30). After his first enlistment the insured did not renew his authorization for the deduction of premiums; no deductions were made, and the premiums were not otherwise paid (R. 25, 30).

Zimmerman was entitled to pay for each and every day from March 18, 1914, to the date of his death on June 30, 1921 (R. 24, 30). When he was discharged from his first enlistment on March 17, 1918, he was paid all money then due him, and when he was discharged from his second enlistment on September 15, 1919, he was paid all money due him at that time. The pay due Zimmerman at the time of his death was paid to his mother, the petitioner (R. 30).

In addition to the facts stipulated, the only evidence introduced was a deposition given on behalf of the Government by Lieutenant Dismukes, who stated that he had official access to the records of enlisted men of the United States Navy and that the records relating to the enlistments of Zimmerman disclosed that Zimmerman had never made any allotment for war-risk insurance premiums other than the authorization for deduction of premiums at the time of his application for insurance, although twelve members of the U.S.S. "Conestoga" (on which Zimmerman was serving at the time of his death) (R. 24) were shown by the records to have executed allotments for the payment of war-risk insurance premiums (R. 32).

The District Court entered judgment for petitioner (R. 27). While it rendered no opinion, some of its findings and its conclusions of law indicate that the District Court considered that the

authorization for deduction of premiums from pay or deposit, pursuant to which deductions were made during the first enlistment after its execution on December 3, 1917, kept the insurance in force until Zimmerman's death on June 30, 1921, because of the insured's continuous service, and that it was not necessary for the insured to renew the authorization in either of the two subsequent enlistments (R. 25–26).

On appeal the judgment for the petitioner was reversed by the Circuit Court of Appeals for the Ninth Circuit (R. 47–58), which held that the authorization for deduction of premiums from service pay ceased to be effective with the expiration on March 17, 1918, of the enlistment in which it was executed, and further that (R. 57):

> * * * the insured, by accepting the money which the appellee now claims should have been appropriated to the payment of the premium of the war risk insurance, in effect consented to an abandonment of his policy for his acceptance of the money which belonged to the government, if the insurance was in effect, cannot be considered otherwise than as a consent to the abandonment of the contract of insurance on his part and an agreement that the policy should be considered as lapsed.

The court therefore ruled that the insurance was not in effect when the insured died on June 30, 1921 (R. 57–58).

ARGUMENT

THE AUTHORIZATION FOR DEDUCTION OF PREMIUMS FROM PAY WAS OF NO EFFECT AFTER THE ENLISTMENT IN WHICH IT WAS GIVEN, AND, THEREFORE, THE INSURANCE LAPSED FOR NONPAYMENT OF PREMIUMS

In determining whether the insurance in question had lapsed when the insured died on June 30, 1921, we are not concerned with the premiums accruing during the period of the insured's first enlistment. These premiums were deducted by the Navy Department from the insured's pay pursuant to the authorization contained in his application for insurance. But commencing with the insured's second enlistment and continuing through his third enlistment until the date of his death, the Navy Department made no further deduction of premiums from the insured's pay, nor were the premiums otherwise paid, and so far as the record discloses no action of any kind was taken by the insured indicative of a desire or an intention to continue his insurance. Petitioner contends, however, that the insurance nevertheless remained in force because it was the duty of the Navy Department during the subsequent enlistments to deduct the premiums pursuant to the authorization which the insured had given during the first enlistment, and that the premiums should therefore be treated as having been paid because the service of the insured from the date of the authorization until his death was continuous and there was available during all of this period sufficient pay which the Navy Depart-

ment could have utilized to pay the premiums of the insured as they became due. The Government contends, on the other hand, that the authorization for deduction of premiums had no effect after the enlistment in which it was given and that the situation was not changed because the insured was a continuous-service man.

The Act authorizing the issuance of war risk insurance to the personnel of the Army and Navy upon application (Act of October 6, 1917), hereinafter called the War Risk Insurance Act, provided that the Director of the Bureau of War Risk Insurance, subject to the general direction of the Secretary of the Treasury, should execute, administer, and enforce the provisions of the Act and should "for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of [the] Act, necessary or appropriate to carry out its purposes", which "regulations, unless the context [of the Act] otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury" (Sec. 13, *infra,* p. 34). By Section 402 of the Act (*infra,* p. 35) the Director was required, subject to the general direction of the Secretary of the Treasury promptly to "determine upon and publish the full and exact terms and conditions of such contract of insurance." By Section 404 (*infra,* p. 35), it was provided that the insurance should be yearly renewable term insurance,

and the duration of the insurance, in the absence of maturity or lapse for nonpayment of premiums, was fixed at five years after the date of the termination of the War as declared by Proclamation of the President, when the insured was required to convert the term insurance into other forms of insurance.

The section then provided that—

> Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

By the use of the word "thereon" in the clause giving the Director authority to regulate "the time and method of payment of the premiums thereon" it would seem that Congress had reference to the converted insurance referred to in the immediately preceding clause.

However, acting apparently upon the assumption that he had the authority either under the clause just referred to or under the general power given him to determine upon and publish the full and exact terms and conditions of the contract of insurance, the Director of the Bureau, nine days after the War Risk Insurance Act was passed, by Bulletin No. 1 (*infra*, pp. 36–37) prescribed a form

of contract of insurance which contained the following provision:

> Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

The Bulletin also stated that—

> In case the applicant does not desire the premium to be deducted from his/her pay (or his/her deposit) he/she should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his/her pay, or if such pay be insufficient, any balance from his/her deposit.

Although obviously not required under this regulation in order to permit the deduction of premiums from pay or deposit (*United States* v. *Barry*, 67 F. (2d) 763, 764 (C.C.A. 6th)), there was printed in the form of application for insurance the following paragraph (R. 20):

> I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

It is upon this paragraph of the application, which the Government accepted by the issuance of the contract of insurance, that the petitioner relies for continuing the insurance during two successive reenlistments until the death of the insured on June 30, 1921. The position of the petitioner is that by virtue of Bulletin No. 1 the duration of this authorization was coextensive with the duration of the contract of insurance, even if the contract should remain in effect because not sooner converted, until five years after the War, and even if several periods of reenlistment may have intervened during the interim, provided, of course, there was sufficient pay due the insured on each premium due date to cover the premium.

This contention, it seems to us, misconceives the real purpose of the provisions of Bulletin No. 1 relating to the deduction of premiums from pay or deposit. The insurance was made available to the

entire personnel of the Army and Navy. Many were located in camps a long distance from Washington; many were at the battle fronts in France and other countries. War conditions had delayed communication and transportation. In consequence, the men frequently did not receive their pay with the same degree of regularity as prevailed in peace times. Confronted with this situation the Director did a very logical and natural thing. He provided in his Regulation an elective method of paying the premiums in cash or by an assignment by the insured of a portion of his monthly pay. Then, to take care of the situation where the insured had elected to have the premiums paid by deductions from pay or deposit but the paymaster through neglect or inadvertence and through no fault of the insured had failed to make the deduction, the Director provided that, "if so to be deducted, a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium." If the deduction could not be made because there was insufficient pay or deposit to cover the premium on the due date thereof, and if the premium was not paid in cash within the grace period of 31 days, the Regulation provided that the insurance should immediately terminate.

Now it is perfectly obvious, it seems to us, that there is not a word in these provisions of Bulletin No. 1 which fixes the duration of an authorization for the deduction of premiums from pay or deposit. Indeed, the very nature of the subject matter with which the Director was dealing, pay of the Army and Navy, would have made any such Regulation inexpedient if not impossible, particularly with reference to the enlisted personnel.

In the first place, by the very Act which gave the Director authority to fix the terms and conditions of the contract of insurance, the Secretary of the Navy and the Secretary of War were given full power to prescribe the conditions and limitations of allotments of pay and deposit by enlisted men. Thus Section 202 of the Act (*infra*, p. 34) provided—

> That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.

And in Section 203 (*infra*, p. 35) it was provided—

> That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Sec-

> retary of the Navy, respectively, may require, under such circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed.

In the second place, the pay of an enlisted man is dependent upon and incidental to his contract of enlistment, and, as was well said by the court below (R. 51–52):

> The policy of the government, as indicated by the legislation bearing upon the subject of enlistment, reenlistment and extension of enlistment, is to limit the period of service of the sailor to a fixed period [1] at the expiration of which the contract of enlistment expires. In order to induce him to reenlist and to continue in the service of the government with the accruing benefit to the government of his service training certain inducements are held out to him, such as increased pay, increased rating and retirement pay.

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[1] See R. S. 1418 (U.S.C., Title 34, Sec. 181) and statutes cited in footnote 4, pp. 23–25, *infra*; Act of June 3, 1916, c. 134, Sec. 27, 39 Stat. 166, 185 (U.S.C., Title 10, Sec. 628).

Enlistments in the Navy may be extended for a definite period pursuant to voluntary agreement by the enlisted man. Act of August 22, 1912, c. 335, 37 Stat. 328 (U.S.C., Title 34, Sec. 184).

During the World War men were drafted or permitted to enlist for the period of the emergency. Act of May 18, 1917, c. 15, 40 Stat. 76; Act of May 22, 1917, c. 20, Sec. 3, 40 Stat. 84, 85.

(The above statutes are those which were in effect at the dates of the reenlistments of the insured in this case. The United States Code citations give the later statutes.)

> These inducements offered by the government, however, do not in any manner affect the fact that the original or subsequent enlistments are separate contracts. Each reenlistment is an absolutely new contract between the Government and the sailor. The obligations assumed by the government in the event of reenlistment are different from those resulting from the earlier enlistments. These obligations are fixed by statute and by the regulations of the department and by reason thereof the sailor, who serves continuously by reenlistment or by an extension of an existing enlistment, receives an additional consideration for the more valuable service thus rendered the government during the subsequent enlistment.
>
> The discharge, however, under any enlistment absolutely terminates any contractual relation between the government and the sailor and the new relations assumed by each in connection with the reenlistment are entirely separate and distinct from the relations theretofore existing except as they are altered by statute or regulation applicable to the new status arising from the reenlistment.

See also *United States* v. *Union Pac. R.R. Co.*, 249 U.S. 354, 358; *In re Grimley*, 137 U.S. 147, 151, 152; *United States* v. *Landers*, 92 U.S. 77, 79.

The court might also have added that the severance of the contractual relation between the Gov-

ernment and the enlisted man which results from a discharge at the end of the period of enlistment is manifested by a complete settlement of the man's pay account (see R. 30).

If the court's analysis of the contract of enlistment is correct, and we do not see how it can be disputed, it obviously demonstrates the fallacy of petitioner's argument. If the contract of enlistment runs only for a definite period of time, any agreement which relates to an incident of that enlistment can certainly have no longer life. As the pay of an enlisted man is an incident of his contract of enlistment, it is evident that an authorization for an assignment of a portion of that pay for a particular purpose can have no longer duration than the contract out of which the pay arises.

In recognition of this principle, we find that it has been the uniform practice of the Navy Department, both before and after the issuance of Bulletin No. 1 by the Director of War Risk Insurance, to limit the duration of an allotment or assignment of an enlisted man's pay to the enlistment in which the allotment or assignment was made. Thus, in paragraph 4472 (5) of Navy Regulations, 1913, p. 330–R (Regulations for the Government of the United States Navy, Reprinted, 1917), it was provided:

> The death, discharge, resignation, or desertion of a person who has an allotment

> running, shall be cause for stopping the same, * * *.[2]

In Paragraph 729, Section 46, Manual for Supply Officers Afloat, United States Navy, 1917, it was provided with reference to allotments (p. 275):

> The death, discharge, resignation, or desertion shall be cause for stopping the same.

In Volume 7, Bureau Memoranda, Supply Corps, U.S. Navy, covering the period from February 1, 1916, to December 31, 1917, there is printed at p. 4392, an ALNAV dispatch from the Secretary of the Navy, dated November 19, 1917, reading in part as follows:

> Compulsory allotments and premiums for insurance taken out by enlisted men under Soldiers and Sailors Insurance Law will be checked against enlisted men's accounts on the first day of each month * * * In case of discharge, death, desertion, stoppage or changes of allotments for other reasons, inform Navy Disbursing Officer or Paymaster Marine Corps by telegrams.

See also War Risk Insurance Circulars One and Three, issued by Bureau of Supplies and Accounts of the Navy Department, which are copied at pp. 18–19, *infra*.

It is evident, therefore, that a paymaster of the Navy was without authority under the Regulations

[2] A similar provision is found in Paragraph 1350, Army Regulations, 1917, which reads: "On the death, discharge, or desertion of a soldier who has an allotment running, the allotment ceases."

deduct insurance premiums from the pay of an
listed man or from his deposits after the expira-
on of an enlistment where the man reenlisted
thout renewal of the authorization. At the time
the second enlistment of the insured in this case
March 18, 1918, the War was still raging and
tle thought had apparently been given as yet to
e devising of a simple and expeditious method
r the renewal of authorizations for the deduction
premiums, as we do not find any Regulations
aling specifically with the subject. There was,
wever, then in effect a well established system
lating to allotments of pay by an enlisted man
the Navy (Navy Regulations, 1913, Pars. 4471–
79), and it is only reasonable to suppose that an
listed man entering upon a second enlistment was
oroughly cognizant of this system. Under this
stem any man desiring to continue his insurance
uld undoubtedly have done so by executing an
otment. However, during the period of the in-
red's second enlistment beginning March 18,
18, and terminating September 15, 1919, hostili-
s had ended, and the authorities realized that a
rge number of policies would be lapsed unless
finite regulations were issued calling the atten-
on of those who were leaving the service to the
sirability of retaining their insurance and giving
ecific instructions as to how this might be accom-
ished. It was only natural that at the same time
e authorities should have given thought to the

problem of the man who reenlisted, and they were confronted with the question whether, if a man in this category wished to retain his insurance and desired the premiums to be deducted from his pay, he should be required to execute a formal allotment of his pay in accordance with the system provided by the Navy Regulations, or whether some simpler method should be devised. The problem was solved by devising a simple and easily comprehended method for the renewal of his authorization by the man who reenlisted. By War Risk Insurance Circular Number One, issued by the Bureau of Supplies and Accounts of the Navy Department on November 15, 1918 (*infra,* pp. 44–45), it was specifically provided in Section 11 that—

> On discharge every man, having an insurance application, shall be furnished with a certified copy thereof and S. & A. Form 374, properly filled out, in duplicate. He shall be instructed to forward both copies of S. & A. Form 374 to the Bureau of War Risk Insurance with the first remittance of premium by him. *He shall be further instructed that, in case of reenlistment, he shall give the certified copy of the insurance application to the officer of the Pay Corps taking up his pay account.* (Italics ours.)

On January 13, 1919, this Regulation was amended in several minor respects by another Regulation issued by the Bureau of Supplies and Accounts, known as War Risk Insurance Circular Number Three (*infra,* p. 47). As amended the Regulation read:

On discharge every man having an insurance application shall be furnished with a certified copy thereof and Treasury Bureau of War Risk Insurance, Form 2303, "Information relative to Compensation and Continuance of War Risk Insurance", properly filled out in duplicate. He shall be instructed to forward both copies of Treasury Bureau of War Risk Insurance, Form 2303, to the Bureau of War Risk Insurance with the first remittance of premium by him. *He shall be further instructed that in case of reenlistment he shall give a certified copy of insurance application to the Officer of the Pay Corps taking up his pay account.* The Officer of the Pay Corps shall check the monthly premium and notify the Disbursing Division, Supplies and Accounts, stating the date of first checkage by him. (Italics ours.)[3]

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[3] See also to the same effect undated circular letter appearing in Vol. 8, Bureau Memoranda, Supply Corps, U.S. Navy, p. 4552, covering period from January 1, 1918, to December 31, 1919 (*infra*, p. 40).

Under Special Regulations No. 72 of the War Department, par. e (3), p. 11, issued March 31, 1919, it would appear that when a man who reenlisted in the Army desired to renew his authorization for the deduction of premiums from his pay or deposit, he was required to give to the commander of the company or detachment to which he was assigned certain detailed information about his insurance. *O'Neill* v. *United States*, 32 F. (2d) 313 (Mass.), indicates that by later regulations the soldier was required to fill out a form in which he expressed the desire to renew his authorization for the deduction of premiums from pay or deposit.

This requirement that an authorization for the deduction of premiums from pay or deposit should be renewed upon reenlistment by the presentation of a certified copy of the application for insurance to the pay officer taking up the insured's pay account was not a senseless requirement. It is true, of course, that the Government had copies of the insurance application in its files (see War Risk Circular Number One, Bureau of Supplies and Accounts (*infra*, p. 43)), but a man may have reenlisted at a point hundreds of miles from that at which he was discharged, with the result that different paymasters would be involved. If some such simple expeditious system had not been devised interminable confusion and delay would undoubtedly have ensued and many policies would probably have lapsed for nonpayment of the first premium due after reenlistment.

In the instant case the record does not disclose whether the insured was advised by the discharging officer at the time of his discharge from his second enlistment on September 15, 1919, that in the event of reenlistment he should give a certified copy of the insurance application to the officer taking up his account in order to renew his authorization for the deduction of premiums from pay or deposit. But, as the court below said, and as was also said in *United States* v. *Barry*, 67 F. (2d) 763, 764 (C.C.A. 6th), now pending in this Court on petition for certiorari No. 808, it must be assumed, in the absence

of evidence to the contrary, that an officer properly discharges his official duties. *United States* v. *Chemical Foundation*, 272 U.S. 1, 14–15. It must consequently be assumed that the insured in this case was advised that he could only renew his authorization by depositing a certified copy of his insurance application with the pay officer taking up his pay account upon reenlistment, and while the findings and stipulation of facts in this case are ineptly expressed in stating that the insured did not upon reenlistment execute any papers for the purpose of renewing his previous authorization for the deduction of premiums from pay or deposit (R. 25, 30), it may logically be inferred from them that the insured took no steps to renew his authorization. In any event, the burden was upon the petitioner to show that the insured had either paid his premiums subsequent to his first enlistment or else had validly renewed the authorization for deduction of premiums from pay or deposit which he had given at the time he applied for the insurance. As the District Court found that he had not paid the premiums during the subsequent enlistments, and as it was neither stipulated by the parties nor found by the court that there was a valid renewal of the authorization for the deduction of premiums, it is evident that the petitioner cannot prevail, unless, as he contends, the situation was in some way changed because the insured was a continuous service man.

It will be observed that there is nothing in the Regulations to which reference has been made placing a man holding a continuous service certificate who reenlists, in any different position with respect to the renewal of his authorization for the deduction of premiums than any other person reenlisting who does not hold such a certificate, and the reason is evident when we examine the statutes and regulations relating to continuous service which were in effect when the insured reenlisted each time.

The Naval Service Appropriations Act of August 22, 1912, c. 335, 37 Stat. 328, 331, provided—

> That section fifteen hundred and seventy-three of the Revised Statutes of the United States as amended by section sixteen of an Act entitled "An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," approved March third, eighteen hundred and ninety-nine, be, and the same is hereby, amended to read as follows: "If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service:[1] *Provided,* That any enlisted

[1] This amount was changed by later legislation, which, however, was not in effect at the dates of the insured's two reenlistments. See Act of June 10, 1922, c. 212, 42 Stat. 625, 630 (U.S.C., Title 37, Sec. 16).

man in the Navy whose term of enlistment has been extended for an aggregate of four years shall, after the expiration of the preceding four-year term of enlistment upon which the extension is made and if otherwise entitled to an honorable discharge, be paid the gratuity above provided: *And provided,* That any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of enlistment, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each successive reenlistment: *And provided further,* That an extension of the period of enlistment as hereinbefore authorized, aggregating four years, shall be held and considered as equivalent to continuous service with respect to all rights, privileges, and benefits granted for such service pursuant to law."[5]

[5] By Section 3 of the Act of May 22, 1917, c. 20, 40 Stat. 84, 85, it was provided that "enlistments in the Navy and Marine Corps, during such time as the United States may be at war, shall be for four years or for such shorter period or periods as the President may prescribe, or for the period of the present war."

The Act of July 11, 1919, c. 9, 41 Stat. 131, provided at page 134 that—

Until June 30, 1920, enlistments in the Navy may be for terms of two, three or four years, and all laws now appli-

Paragraph 3529 (1) of Navy Regulations, 1913, provided that—

> Any man who, having been honorably discharged, or discharged with a recommendation for reenlistment, shall within four months thereafter reenlist for four years shall receive in exchange for his discharge a continuous-service certificate * * *.

And in paragraph 4427 (22) of Navy Regulations, 1913, it was provided that—

> If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service * * *.

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cable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment.

And at page 139—

Any enlisted man of the Navy, Marine Corps, or Coast Guard, who, since February 3, 1917, and before November 11, 1918, enlisted for the period of four years shall upon his application made to the Secretary of the Navy on or before September 1, 1919, be held and construed to have enlisted for the duration of the war and shall when discharged be granted an honorable discharge, and upon the taking effect of this Act shall be notified by the Secretary of the Navy of his right to file such application: *Provided*, That said enlisted man is otherwise entitled to an honorable discharge: *Provided further*, That the return home of the American

It is apparent from this survey of the statutes and regulations that the only significance that "continuous service" has is that a bounty and increased pay is given by the Government to encourage the early return to the service of the experienced sailor. "Continuous service" does not bridge the hiatus in service which results from the discharge and the reenlistment. Whether a man is a continuous service man or not, each enlistment is, under the principle heretofore stated (*supra*, pp. 13–15), a new and separate contract. There can therefore be no logical reason why a man without continuous service who reenlists should be required to renew his authorization for the deduction of premiums from pay or deposit while the continuous-service man who reenlists is free from this requirement. Moreover, under the Regulations a man may wait four months after the expiration of his previous enlistment before reenlisting and still be entitled to a continuous-service certificate. The grace period for the payment of his premiums will have expired and the reenlistment may have taken place hundreds of miles from the place of discharge

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Expeditionary Forces shall not be thereby delayed: *Provided further*, That any enlisted man who takes advantage of the provisions of this paragraph to secure a discharge from the Navy, Marine Corps, or Coast Guard, and thereafter reenlists within four months in the Navy or in the Marine Corps, under conditions as now prescribed by law, for a period of four years, shall be entitled to receive the benefits of the gratuity pay provided by existing law for reenlistments.

from his preceding enlistment. Different paymasters may thus be involved. Can it be that this man stands on a different plane than the one who, as in the instant case, reenlists the next day, although both are continuous-service men? We think not.

Considering the regulations as a whole,[6] we submit that there was an administrative construction as to the duration of authorizations for deduction of premiums from pay or deposit which is wholly at variance with the view taken by the petitioner in this case. If the interpretation sought by petitioner should be applied, there would be no apparent limitation upon the duration of an authorization for deduction of premiums from pay or deposit heretofore administratively confined to the enlistment in which it was executed, and no apparent reason to deny the continuance of insurance protection (without knowledge of insurer or insured) in all cases of continued service in any other branches of the Government, civil, military, or naval. The insurer would be faced with a tremendous potential liability clearly not contemplated by the contract or the statute. Such a construction of the regulations upon which petitioner relies should, of course, be avoided.

Moreover, the action of the insured in accepting the full amount of his pay without deduction

[6] Regulations referred to by the petitioner in her brief but not considered herein are either of similar import to those discussed herein or else were not in effect at the dates of the insured's two reenlistments.

for premiums during two enlistments subsequent to that in which the authorization was given, a period of over three years, is, we submit, persuasive evidence of an acquiescence by the insured himself in the contemporaneous administrative construction of the duration of the authorization. It is difficult to believe that the insured, an experienced sailor, did not know during all this three-year period that the premiums were not being deducted from his pay. It is not an unreasonable assumption that, as was said by the court below, the insured "must have known" that the premiums were not being checked against his pay account (R. 57).

With reference to a quite similar situation, the Circuit Court of Appeals for the Sixth Circuit made the following comment in *United States* v. *Barry*, 67 F. (2d) 763, 765:

> Moreover, the record clearly requires the conclusion that Barry's default was his deliberate and voluntary act or omission. Barry knew his insurance was not in force after October 1st. In addition to the notice given to him upon discharge he received his full pay during his final enlistment period. It is inconceivable that a soldier of his experience would not know precisely the amount of pay coming, even though from month to month it varied. He had been in the army since 1908, had been a second and a first lieutenant, and was sergeant major during his final term. Subsequent efforts to

> have his insurance reinstated lends, in our opinion, additional support to this conclusion. Insofar as they are urged in support of an inference that Barry did not know that his insurance premiums were not being paid, it is only necessary to say that when proven facts support equally two inconsistent inferences, there is no substantial evidence to support either, and judgment must go against the party having the burden. *Pennsylvania R. Co.* v. *Chamberlain,* 288 U.S. 333, 339, 53 S.Ct. 391, 77 L.Ed. 819.

See also *Crawford* v. *United States,* 291 Fed. 801, 805–806 (N.D.Ohio).

While there have been several cases presenting questions closely related to that under consideration in this case, it is significant that no insured has himself ever contended that an authorization for deduction of premiums from service pay extended beyond the enlistment in which it was executed. There is no record of any war-risk insurance case ever having been filed during the lifetime of the insured, in which the theory has been advanced that insurance protection continues during an enlistment in which premiums were not deducted, because of an authorization for deduction of premiums executed during a prior enlistment.

The decision of the Circuit Court of Appeals in the instant case is supported by the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Barry,* 67 F. (2d) 763, and by that of the Circuit Court of Appeals for the Second

Circuit in *Sawyer* v. *United States,* 10 F. (2d) 416, but is contrary to the decision of the Circuit Court of Appeals for the Tenth Circuit in *Unger* v. *United States,* 65 F. (2d) 946. See also *O'Neill* v. *United States,* 32 F. (2d) 313 (D.C.Mass.); and *Mortek* v. *United States,* 297 Fed. 485 (E.D.Ill.).

The decisions in the instant case, the *Barry* case, and the *Sawyer* case, are predicated upon the expiration of the authorization for deduction of premiums with the expiration of the contract of enlistment to which it is incident, and in the instant case and the *Barry* case, upon the additional ground that the long continued receipt of pay without premium deductions constituted a voluntary abandonment of insurance.

In the *Unger* case, *supra,* it was held that an authorization for deduction of premiums from service pay executed during one enlistment remained in effect during a second enlistment and that as the soldier was entitled to continuous-service pay from which deductions could have been made for insurance premiums they should have been treated as paid although such deductions were not in fact made. The opinion makes no reference to the Army Regulation that "On the death, discharge, or desertion of a soldier who has an allotment running, the allotment ceases" (paragraph 1350, Army Regulations, 1917).[7]

[7] The Government did not apply for certiorari in the *Unger* case, for the reason among others, that as the case was remanded for a new trial without the court passing upon

The case of *United States* v. *LePage*, 59 F. (2d) 165 (C.C.A. 1st), relied upon in petitioner's brief, is not in point. The question there decided related to an application for war-risk insurance made on behalf of the soldier by a third party on the last day of the statutory period within which applications might be received. The application was ratified by the soldier after the expiration of the statutory period, and the opinion was concerned primarily with the question whether the application was timely executed. The case did not present the question whether an authorization for deduction of premiums from service pay executed during one enlistment is effective during a subsequent enlistment.

In the case of *O'Neill* v. *United States, supra*, a District Court decision, there were three periods of service, in the first two of which the premiums were deducted from service pay. There was no renewal of the authorization for the deduction of premiums during the third enlistment of the insured, who died shortly after the beginning of this enlistment. Although the court stated in the early part of its opinion that (pp. 313–314)—

> It was in evidence that the Bureau of War Risk Insurance had adopted form 758, revised to February 1920, which was to be used after reenlistment into active service,

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the sufficiency of the evidence to support the judgment, the question decided might not arise upon a second trial in view of an allegation in the complaint that the insured was permanently and totally incapacitated prior to his first discharge.

> and only for the purpose of renewing previous authorization of deduction from pay for yearly renewable term insurance. This form calls for the signature of the soldier, and in it he expresses a desire that the insurance be continued for a specified amount, and renews his authorization to deduct. * * *

and although this regulation was in effect at the time of the insured's third enlistment, the court held (p. 314) that there was "no statute or regulation requiring the insured to renew the authority which, in his application, he had conferred upon the government to deduct the premium from his pay." The court also held that while the insured during his third enlistment (p. 313)—

> signed the pay roll each month, * * * the amounts received varied, and unless he made a careful examination of the pay roll he would have had no reason to believe that the deductions were not being made as theretofore. I do not find that he had actual knowledge that the premiums were not being deducted.

In the *Mortek* case, *supra,* also a District Court decision, a second enlistment was not involved, and the question presented was whether, pursuant to an authorization for the deduction of premiums from pay, uncollected pay due a soldier at the date the Government contended he was discharged from the service could be applied to the payment of a pre-

mium which would have kept the insurance in effect until his death several months after the discharge. If the opinion is susceptible of the construction that it held that an authorization for deduction of premiums from pay or deposit continues effective after the expiration of the contract of enlistment in the course of which it was executed, and to which it is incident, it may be pointed out that several months after it rendered its opinion the court, upon rehearing, found as a fact that the insured remained in the service under a single enlistment to the date of his death, and entered judgment accordingly. (A copy of the journal entry of judgment in the *Mortek* case appears in the Appendix, *infra*, p. 48.)

CONCLUSION

It is respectfully submitted that the duration of an authorization for the deduction of war-risk insurance premiums from Navy pay was subject to the Regulations of the Navy Department; that under such Regulations the authorization ceased to be effective with the expiration of the contract of enlistment in the course of which it was executed and to which it was incident; that the Regulations of the Bureau of War Risk Insurance upon which petitioner relies were never intended to continue insurance in force during enlistments subsequent to the enlistment in which the deduction of insurance premiums from pay was authorized, and that such construction of the Regulations of the Bureau

of War Risk Insurance would render them of doubtful validity and therefore should be avoided. For the reasons stated it is respectfully submitted that the judgment below should be affirmed.

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MAY 1934.

APPENDIX

STATUTES AND REGULATIONS

Pertinent Provisions of the War Risk Insurance Act, as amended October 6, 1917:

Section 13 (40 Stat. 399):

That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections five and four hundred and five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. * * *

Section 202 (40 Stat. 403):

That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.

Section 203 (40 Stat. 403):

That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under such circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed.

Section 402 (40 Stat. 409):

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance.

* * * * *

Section 404 (40 Stat. 410):

That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

REGULATIONS

Bulletin No. 1, issued by the Director of War Risk Insurance on October 15, 1917 (Regulations and Procedure United States Veterans' Bureau, Part. II, pp. 1235, 1237), provides in part as follows:

> 3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):
>
> Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department', approved September 2, 1914, and for other purposes", approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:
>
> Hereby insures from and after the ------ ---------- day of ---------- 19--, John Doe, of Illinois, private, Company A, Third Infantry, conditioned upon the payment of premiums as herein provided. * * *
>
> Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if

so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

* * * * *

4. * * * In case the applicant does not desire the premium to be deducted from his/her pay (or his/her deposit) he/she should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his/her pay, or if such pay be insufficient, any balance from his/her deposit.

Navy Regulations (1913), Paragraph 4472 (5):

The death, discharge, resignation, or desertion of a person who has an allotment running, shall be cause for stopping the same, and the supply officer of the ship to which the person was attached shall notify the Navy disbursing officer by the first opportunity, stating the amount checked by himself, and the last month for which checked, except in the case of marines transferred to a shore station within the continental limits of the United States, when the supply officer of the

ship will transfer the allotment to the marine paymaster of that station for stoppage by the latter. The supply officer will be held liable for amounts paid by the Navy allotment officer in the absence of due notice. But this shall not relieve the Navy allotment officer from responsibility for losses resulting from overpayments due to want of diligence on his part, either in the making of immediate acknowledgment of supply officers' notices or from lack of cooperation in effecting the proper checkages against grantor's account. When an allotment is stopped the supply officer shall charge the allotment for as many months in advance as will probably be required for information to reach the Navy allotment officer. Forfeiture of pay by sentence of a general or summary court-martial or deck court shall also be cause for stopping an allotment when the payment of such allotment, in addition to the forfeiture, would place the grantor in debt to the Government. The allotment in such case may be renewed immediately sufficient pay has become due him to cover the amount of the first payment. (Regulations for the Government of the Navy of the United States, 1913.)

Section 46, Manual for Supply Officers Afloat, United States Navy, 1917, (Paragraph No. 729):

Causes and method of stoppage.—"The death, discharge, resignation, or desertion shall be cause for stopping the same" (N.R. 4472–5).

* * * * *

ALNAV despatch sent by the Secretary of the Navy, November 19, 1917:

Paragraph 2 (b) of Article 4893 Naval Instructions is hereby canceled. Compulsory allotments and premiums for insurance taken out by enlisted men under Soldiers and Sailors Insurance Law will be checked against enlisted men's accounts on the first day of each month. After these checkages have been made, all remaining pay is subject to checkage for loss of pay by sentence for general, summary or deck courts, or checkage for Government property loss. If, however, the sentence of a general court involves prison confinement, all pay being forfeited as a result of such sentence, allotments and insurance are also forfeited and will not be deducted. After checkages for compulsory allotments, premiums on insurance and loss of pay due to general, summary or deck courts as aforesaid have been made, remainder of pay is subject to checkage for voluntary allotments. When pay is stopped by reason of absence from duty without authority or due to misconduct, allotments and premiums on insurance will be stopped for the period during which pay is so lost, unless enough pay shall accrue during the current month notwithstanding misconduct checkages to cover such allotments or premiums. New War Risk Navigation and Marine Corps forms will be forwarded to Bureau of Navigation or Major General Commandant in case of Marines whenever any change occurs. In case of discharge, death, desertion, stoppage or changes of allotments for other reasons, inform Navy Disbursing Officer or Paymaster Marine Corps by telegram. (Volume 7, Bureau Memoranda, Supply Corps, U.S. Navy, p. 4392, covering period from Feb. 1, 1916, to Dec. 31, 1917.)

War-risk allotments and insurance: Circular letter (not dated) regarding stop notices therefor and certified copies thereof:

* * * * *

4. When a person is discharged from the Service he should be notified as to his option of continuing insurance, the amount of the premium, and the fact that all remittances should be made payable to the Treasurer of the United States and forwarded to the Bureau of War Risk Insurance together with full name, former ship or station, rating and period which premium covers. A man leaving the service should be furnished a certified copy of his Insurance application and instructed that in the event of reenlistment in any branch of the service he should present the same to the Pay Officer taking up his account who should thereafter check premium against his pay. (Volume 8, Bureau Memoranda, Supply Corps, U.S. Navy, p. 4552, covering period from Jan. 1. 1918, to December 31, 1919.)

War-Risk Insurance Circular Number One

141–15–Adm

Navy Department,
Bureau of Supplies and Accounts,
Washington, D.C., November 15, 1918.

To: Commandants, Commanding Officers, and Officers of the Pay Corps.

The following instructions are issued for the guidance of all concerned in the matter of War Risk Insurance and Family Allotments. They combine all instructions, completely revised to date, which have been issued. In the future all instructions regarding War Risk Insurance and Family Allotments will be issued from the Allotment Division, Bureau of Supplies and Accounts.

McGowan.

* * * * *

INSURANCE

1. Every commissioned officer and enlisted man and every member of the Navy Nurse Corps (female), when employed in active service under the Navy Department, shall be given an opportunity to apply for government insurance in any amount from $1,000 to $10,000 in multiples of $500.00, within one hundred twenty (120) days from date of enlistment, or date of reporting for active service. Application shall be made on Treasury Form 2A and if possible, should be prepared on the typewriter. In case of enlisted personnel, the application shall be witnessed by an officer.

2. The beneficiary named in an insurance application must bear the relationship to the insured of spouse, parent, or grandparent (of either insured or the spouse of insured), grandchild, brother, or sister, as defined by the War Risk Insurance Act. A change of beneficiary may be made at any time within the permitted class and without the consent of the beneficiary previously named in the application of the insured. Application for change of beneficiary will be made on Treasury Department Form 724, witnessed by an officer, which shall be forwarded in triplicate to the Navy Allotment Officer.

3. The responsibility for the proper execution of applications for government insurance rests upon Commanding Officers and Commandants. Every application for insurance shall be executed in quadruplicate and forwarded immediately by the applicant's Commanding Officer to the Officer of the Pay Corps on whose rolls the applicant's pay account is carried.

4. Every application shall be inspected as to its completeness by the officer carrying the applicant's pay account. If found improperly executed, the officer carrying the accounts will return the application to the applicant's Commanding Officer, pointing out in what respects the application is incomplete or incorrect. The responsibility for the proper checkage of insurance premiums rests on the officer of the Pay Corps carrying the account against which the premium is to be charged.

5. Every application for insurance which is correct, shall be recorded at once by the officer carrying the account of the applicant. A description of

the insurance shall be entered on the pay roll and a record kept similar to that kept for Navy voluntary allotments (S. & A. Form 6). The following indorsement will be placed on the back of every recorded application for insurance:

_____, 19___.
(Day) (Month)

Recorded by me this date. Checkage of premium ($_____) will be made by me monthly from date of application.

First checkage made _____, 19___, for
(Day) (Month)
$_____.

_____

_____ Pay Corps, U.S.N.

6. After an application has been recorded, the original and first copy shall be forwarded immediately to the Navy Allotment Officer, Washington, D.C. The Navy Allotment Officer will file a copy of the application and forward the original to the bureau of War Risk Insurance. The remaining two copies will be retained by the officer of the Pay Corps who registers the application—one copy for his permanent files and the other to be forwarded with the transfer pay account of the applicant.

7. Letters transmitting applications for insurance shall indicate the number of applications inclosed therewith as is the practice in forwarding applications for Navy voluntary allotments (S. & A. Form 6). Correspondence from all persons in the naval service, regarding government insurance, shall be forwarded to the Navy Allotment Officer.

8. In no case will Insurance premiums be prorated. The premium charged for insurance shall be entered on the debit side of the pay roll in the column headed, "War Risk Insurance Premiums." Checkage of one month's premium shall be made

on the day the application is executed and, thereafter, one month's premium shall be checked on the first day of every month. Checkage must be made on the Navy pay roll of premium for every application for insurance executed by officers or men of the NAVY. Checkage of insurance premium will continue while a man is in a pay status, or until the insurance is cancelled by written request over the man's signature, forwarded through the officer of the Pay Corps carrying his account. The cancellation of insurance at the request of this insured will become effective on the first day of the month following that in which request is made.

9. The insurance is issued at monthly rates for the age (nearest birthday) of insured when insurance becomes effective. On July 1, 1919, all premiums on insurance, which has been in force for twelve months, will be increased to the amount of premium for the next age above that shown on the application. Thereafter on 1 July of each year, all premiums for insurance, which has been in force for twelve months, or more, will be increased to the amount of premium for the next succeeding age of the applicant.

10. All transfer pay accounts shall contain full information regarding insurance carried by the man transferred, including a statement as to the last month charged. A copy of every application for insurance, certified true and correct by an officer of the Pay Corps, will accompany every transfer pay account.

11. On discharge every man, having an insurance application, shall be furnished with a certified copy thereof and S. & A. Form 374, properly filled out,

in duplicate. He shall be instructed to forward both copies of S. & A. Form 374 to the Bureau of War Risk Insurance with the first remittance of premium by him. He shall be further instructed that, in case of reenlistment, he shall give the certified copy of the insurance application to the officer of the Pay Corps taking up his pay account.

12. At the end of each quarter, and on detachment, all officers of the Pay Corps, carrying pay accounts, will submit with their quarterly returns, an abstract of checkages on revised S. & A. Forms 375 and 375a. In Column 6 of this form, will be entered, opposite each man's name, the total amount of insurance premium charged for the current quarter. All checkages, or reports, of premiums for periods prior to the current quarter, will be entered in Columns 8 or 9, indicating in Column 10, insurance by "I" and noting the month for which the charge is made. The abstract should contain the names in full of all men concerned, listed in sequence of pay number. Separate abstracts will be rendered for each roll. All errors found in the abstracts which have been forwarded to the Navy Allotment Officer, will be corrected in the Correction Column of the next abstract submitted, but never by separate letter. Where it is not possible to make such corrections on a subsequent abstract, by reason of the account having been transferred from the roll, request for correction of error will be made in the usual way, namely, by requesting credit or checkage, on the officer to whom the account has been transferred.

13. On all applications, abstracts or correspondence concerning War Risk Insurance, the given names, as well as surnames of both the appli-

cant and the beneficiaries should be spelled out in full. In no case should initials alone of given names be used.

14. The checkage of insurance premiums will take precedence over government indebtedness due to property loss, and loss of pay by sentence of deck court, summary court-martial, or general court martial not involving prison confinement. Sentence of general court-martial involving prison confinement will operate to stop checkage of insurance premiums on the Navy pay roll. In such cases, the man should be instructed to remit, or have someone else remit, the premium directly to the Bureau of War Risk Insurance, or suffer his insurance to lapse. Government insurance may be cancelled for the reasons specified in Section 29 of the War Risk Insurance Act as amended 25 June 1918, or upon the request of the insured over his signature. In all cases where checkage of insurance premium is discontinued, notice thereof should be sent immediately to the Navy Allotment Officer on S. & A. Form 373.

15. In the case of absence without leave Insurance premium will be checked from subsequent pay. If the absence develops into desertion, checkage will be stopped with the premium for that month, provided there is sufficient money due; if not, checkage will be stopped with the preceding month. If a man is not in a pay status by reasons of the operation of G.O. 231 (misconduct) Insurance premiums may be checked from money due, or from subsequent pay, provided a period of sixty (60) days has not elapsed during which no premium was checked, in which case the man must apply for reinstatement.

War Risk Insurance Circular Number Three

151–15–Adm

Navy Department,
Bureau of Supplies and Accounts,
Washington, D.C., 13 January, 1919.

To: Commandants, Commanding Officers, and Officers of the Pay Corps.

1. Insurance Paragraph 11 of War Risk Insurance Circular Number One is hereby amended to read as follows:

> On discharge every man having an insurance application shall be furnished with a certified copy thereof and Treasury Bureau of War Risk Insurance, Form 2303, "Information Relative to Compensation and Continuance of War Risk Insurance", properly filled out in duplicate. He shall be instructed to forward both copies of Treasury Bureau of War Risk Insurance, Form 2303, to the Bureau of War Risk Insurance with the first remittance of premium by him. He shall be further instructed that in case of reenlistment he shall give a certified copy of insurance application to the Officer of the Pay Corps taking up his pay account. The Officer of the Pay Corps shall check the monthly premium and notify the Disbursing Division, Supplies and Accounts, stating the date of first checkage by him.

McGowan.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

Rosa Mortek, plaintiff, v. *United States, defendant*

No. 1815

JOURNAL ENTRY

This cause coming on to be heard this 7th day of July 1924, upon motion of the defendant, the United States of America, for a rehearing was argued by counsel and submitted to the Court, and the Court, being fully advised in the premises, finds said motion well taken and grants the same.

And thereupon said cause being further argued by counsel, and the Court being fully advised in the premises, finds that at the time of the death of the said John Frank Musial, to-wit, April 17, 1919, the said John Frank Musial had not been discharged from active military service of the United States.

The Court further finds that while the said John Frank Musial was in the United States Military Service he applied for and was granted War Risk Insurance in the sum of $10,000 on his application dated May 6, 1918, Certificate No. 2094571, for $5,000, and on his application dated July 6, 1918, Certificate No. 4677503, for $5,000; that said insurance was made payable from and after the death of the said John Frank Musial to his sister, Rosa Mortek, plaintiff herein, the same being payable in installments as provided in the War Risk Insurance Act, as amended.

The Court further finds that the said John Frank Musial in and by his said applications authorized

deductions from his active service pay for premiums on said War Risk Insurance in the following language:

> I authorize the necessary monthly deduction from my pay, or, if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

And it appearing to the Court that a Regulation of the Bureau of War Risk Insurance, known as T.D. 33 W.R., promulgated September 20, 1918, was in full force and effect at the time of the death of the said John Frank Musial, which said Regulation, among other things, provided as follows:

> The insurance granted under Article V of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premiums while the insured is in the active military or naval service and premiums therefor are authorized to be deducted from the insured's pay or deposit.

NOW, THEREFORE, in view of the foregoing, the Court finds that said War Risk Insurance, applied for and granted to the late John Frank Musial, was in full force and effect at the time of his death.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, Rosa Mortek, is entitled to the monthly installments on said $10,000 insurance from April 17, 1919, in accordance with the provisions of the War Risk Insurance Act as amended; provided that nothing herein contained shall be taken as determining or affecting the rights of anyone to the installments unpaid on said insurance in the event that the said Rosa Mortek shall die before the same are fully paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Noleman, Smith & Dallstream, Counsel for plaintiff, be, and they are hereby allowed a counsel fee of Five Hundred ($500.00) dollars, payable by the plaintiff in the manner provided by law.

(Signed) GEORGE W. ENGLISH,
Judge.

UNITED STATES OF AMERICA,
Eastern District of Illinois:

I, MARSHALL E. DANIELS, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seal thereof, hereby certify that the above and foregoing is a true and perfect copy of the Journal entry in said cause, entered by said court, on the 7th day of July, A.D. 1924, in which Rosa Mortek was plaintiff and the United States, defendant, the same being equity No. 1815, as the same remains on file and of record in my office.

WITNESS my hand and the seal of said Court at my office in the City of East St. Louis, in said Eastern District of Illinois, this 18th day of July, A.D. 1924.

[SEAL] (Signed) MARSHALL E. DANIELS,
Clerk.

By F. G. GOODFELLOW,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 742.—October Term, 1933.

Bertha Meyer Smith, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 21, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

By complaint filed in the District Court for Oregon, May 22, 1929, petitioner sought judgment against the United States for benefits said to have accrued to her under War Risk Insurance taken out by her son, Elias Melvin Zimmerman in 1917. While enlisted in the Naval Service he died aboard the U. S. S. "Conestoga" June 30, 1921.

The United States denied liability upon the ground that the policy lapsed for nonpayment of premiums and was not in force after April 30, 1918.

By agreement the cause was tried without a jury. The District Court gave judgment for the complainant—petitioner here; the Circuit Court of Appeals reached a different conclusion and ordered reversal.

There is no dispute in respect of the essential facts.

Zimmerman enlisted in the Navy March 18, 1914, as an apprentice seaman and was honorably discharged at the expiration of his term March 17, 1918; he re-enlisted March 18, 1918, and received an honorable discharge September 15, 1919; he enlisted again September 16, 1919, and served until death. He held a continuous service certificate; but when this was actually received does not appear.* War Risk insurance amounting to $10,000 issued upon his application dated December 3, 1917, which contained the

*Navy Regulations, 1913.

"Paragraph 3529 (1)—Any man who, having been honorably discharged, or discharged with a recommendation for reenlistment, shall within four months thereafter reenlist for four years shall receive in exchange for his discharge a continuous service certificate. . . .

"Paragraph 4427 (22)—If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he

following clause, never formally revoked—"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid."

The policy provided for monthly payments in the event of death or total disability occurring while it remained in force. It designated petitioner as the beneficiary. A Bulletin issued by the Director of War Risk Insurance, as authorized by the War Risk Insurance Act, 40 Stat. 398, 409, in force when the policy became effective, contained the following regulation:

"Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period of grace the insurance shall remain in full force"; also "In case the applicant does not desire the premium to be deducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

Payments due upon the policy were met by deductions of $6.50 monthly from the assured's pay until the end of his first enlistment. Thereafter no deduction was made; he executed no new authorization for deductions; no premium was actually met. He was entitled to pay for every day from March 18, 1914, until his death.

When honorably discharged from his first enlistment Zimmerman received the full amount then due him; also, when discharged from his second enlistment. All pay due at his death was received by his mother, the petitioner. The records of the Navy Department "disclose that he never made any allotment for War Risk

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shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service. . . ."

Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance."

Petitioner insists that although no premium upon the policy was actually paid after March, 1918, it nevertheless remained in full force and effect during the assured's active service because of the unrestricted authorization for deductions in his application of December 3, 1917 never thereafter revoked in writing, since there was due him at the end of each month enough to meet the required premiums and the Navy Department was under a duty to make proper deductions.

In behalf of the United States the insistence is that the authorization for deductions was ineffective after the expiration of the first enlistment during which it was given. Moreover, that the action of the assured in accepting his pay without deduction for premiums during all of his second and third enlistments—more than three years—is enough to show acquiescence in the contemporaneous construction by the administrative officers; and, no circumstance indicating the contrary, this establishes his purpose to surrender the contract as he properly could have done.

We are of opinion there is enough to show abandonment of the contract by the assured and upon that ground the judgment of the Circuit Court of Appeals should be affirmed.

After expiration of the first enlistment, neither party to the contract appears to have treated as operative the authorization for deductions contained in the application. Zimmerman accepted every month during a considerable period the full amount due him; made no effort to provide for payment of premiums when he must have been aware that no deduction had been made. There is nothing to indicate that he did not have full possession of his faculties, or lacked intelligence or probity, or that he was unaware of the important circumstances. If he had supposed the insurance remained in effect, common honesty would have moved him to provide for actual payment of the premiums. He must have known they had not been met. In the circumstances his conduct, we think, adequately indicates the exercise of his right to abandon the policy. See *Sawyer* v. *United States*, 10 Fed. (2d) 416; *United States* v. *Barry*, 67 Fed. (2d) 763; *contra*, *Unger* v. *United States*, 65 Fed. (2d) 946.

The challenged judgment must be

Affirmed.